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No. _____

In the
Supreme Court of the United States

GENE CASHMAN and EUGENIA GUINN,

Petitioners,

v.

CITY OF COTATI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in *Lingle v. Chevron*, 125 S. Ct. 2074 (2005), held that a "substantially advances a legitimate state interest" test requiring courts to decide whether an ordinance furthers its objectives is not a stand alone takings test. This sort of means-ends analysis is limited to a due process claim.

Petitioners brought a takings claim under another form of the substantially advances test–one that requires a close connection between the effect of an ordinance and the objective sought to be achieved by a regulatory constraint. This is the cause-effect test applied in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

1. Does this Court's decision in *Lingle v. Chevron* preclude an independent substantially advances takings claim that requires courts to decide whether there is a close connection between the effect of a regulation and the objective sought to be achieved by a regulatory constraint?

2. Should Petitioners' pre-*Lingle* substantially advances takings claim be decided under a due process analysis post-*Lingle*, where Circuit Court precedent prohibited Petitioners from bringing a due process claim?

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PETITION FOR WRIT OF CERTIORARI

Gene Cashman and Eugenia Guinn respectfully petition for a writ of certiorari to review the July 15, 2005, Judgment of the Ninth Circuit Court of Appeals (Petitioners' Appendix, B) affirming the district court's judgment in favor of the City of Cotati or, alternatively, remand the case for further proceedings.

OPINIONS BELOW

The Judgment of the Ninth Circuit Court of Appeals, dated July 15, 2005 (Pet. App. A) is unpublished. The Ninth Circuit's July 15, 2005, Order granting the City of Cotati's petition for rehearing and reversing its earlier opinion (Pet. App. B), is published at 415 F.3d 1027 (9th Cir. 2005). The September 4, 2002, Judgment of the district court (Pet. App. C), adopted by the Ninth Circuit Court after its grant of Cotati's petition for rehearing, is unpublished. The Findings of Fact and Conclusions of Law (Pet. App. D), also dated September 4, 2002, are unpublished.

The Ninth Circuit's Order denying Cashman's and Guinn's petition for rehearing (Pet. App. E) is dated August 25, 2005, and is unpublished.

The Ninth Circuit's July 14, 2004, opinion before rehearing (Pet. App. F) is published at 374 F.3d 887(9th Cir. 2004). The June 21, 2000, Judgment of the district court (after summary judgment) (Pet. App. G), adopted by the Ninth Circuit Court in its July 14, 2004, opinion, is unpublished as is the June 21, 2000, Memorandum Decision and Order (Pet. App. H).

JURISDICTION

The order of the Ninth Circuit Court of Appeals was filed and entered on July 15, 2005. Pet. App. B. Petitioners Gene Cashman and Eugenia Guinn timely sought rehearing, which was denied on August 25, 2005. Pet. App. E. This petition is timely under Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall be deprived of property without due process of law, "nor shall private property be taken for a public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

California Civil Code Section 798.56. Full text at Pet. App. I

California Civil Code Section 798.73. Full text at Pet. App. J

California Civil Code Section 798.74. Full text at Pet. App. K

Cotati, California, Ordinance No. 680 (1998), Chapter 19.14, Cotati Municipal Code. Full text at Pet. App. L.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Gene Cashman and Eugenia Guinn own two of the three mobile home parks in the City of Cotati,[1] and are subject to the provisions of Cotati's rent control ordinance. The rent control ordinance, Ordinance No. 680, limits the circumstances where Petitioners can increase rents, and it limits the amount and frequency of rent increases. (Pet. App. L-12-14, section 19.14.004; Pet. App. L-22-23, section 19.14.007; L-36-37, section 19.14.150.) Most importantly for purposes of this case, the provisions of Ordinance No. 680, in operation with California's Mobilehome Residency Law (which protects mobile home owners from actual or constructive eviction) (Pet. App. I; Pet. App. J; and Pet. App. K, section 798.74(a)) creates a situation where a valuable property interest is transferred from mobile home park owners to their lessees, the mobile home coach owners.

The valuable property interest manifests itself in the form of a monetary premium that is captured by mobile home owners when they sell their coaches. The premium represents the present value of future below-market rents; in other words, people will pay more to live in a mobile home park where regulation provides continuing below-market rents.

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[1] A third park owner, Elizabeth White, was a plaintiff in the lawsuit, but dismissed her claims against Cotati after selling her mobile home park. Another of the original plaintiffs, Athena Sutsos, died on April 6, 2005. Her daughter and successor trustee of her living trust, Eugenia Guinn, substituted in as a party on May 31, 2005.

To avoid confusion on this point, the parties at all stages of the proceedings in this case will be referred to as Cashman and Guinn.

Premiums have been described and explained by the courts in a variety of ways: a premium is the ability to monetize the present value of the reduced ground rent by conveying a dwelling subject to a lease with a below-market rent (*see Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1164 (9th Cir. 1997)); a premium reflects the net present value of the difference between the government-controlled land rent and the free market land rent (*see id.* at 1165); and a premium captures the value of the decreased rent upon the sale of a leasehold (*Chevron U.S.A., Inc. v. Cayetano*, 57 F. Supp. 2d 1003 (D. Haw. 1998)). "The problem with rent control plans which permit the tenant to transfer his right to below-market rates is the tenant's ability to command a premium for his right." *Richardson v. City and County of Honolulu*, 802 F. Supp. 326, 337 (D. Haw. 1992) (*aff'd* in *Richardson v. City and County of Honolulu*, 124 F.3d 1150), *referencing generally*, Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988). A premium allows a one-time transfer of wealth to the tenant in possession at the time rent control is imposed, a windfall which can never be recovered by mobile home park owners or future tenants. *See Yee v. City of Escondido*, 503 U.S. 519, 530 (1999); Hirsch & Hirsch, 35 UCLA L. Rev. at 430-31.

Three conditions, in addition to government-controlled rents, are required for mobile home coach owners to capture the value of occupying spaces in rent controlled parks: a divided property interest (the owner of the land is different than the owner of the dwelling unit), the lessees' ability to transfer the right to controlled rents, and a dwelling unit that is unlikely to be moved. *See Cashman v. City of Cotati*, 374 F.3d 887, 899 (9th Cir. 2004), Pet. App. F-21. All of the conditions are present in this case. *Id.* Petitioners own the land underlying the mobile homes in their parks; the lessees own the mobile homes. *Id.* Coach owners can transfer ownership of their coaches

subject to the controlled rent. *Id.* And mobile homes, as a practical matter, are immobile, because the cost of moving a mobile home represents a significant fraction of the value of the home itself. *See Yee v. City of Escondido*, 503 U.S. at 522-23 (citing Hirsch & Hirsch, 35 UCLA L. Rev. at 405.

Mobile home park owners are forced to bear a disproportionate share of the cost of Cotati's plan to provide affordable housing to its citizens. Cotati's rent control ordinance does not provide a mechanism by which the park owners can recover any part of the property interest transferred to their lessees by the premium. *Cashman v. Cotati*, 374 F.3d at 899, Pet. App. F-21. Mobile home coach owners, on the other hand, pay below-market rents as long as they remain in a rent-controlled park, and ultimately sell their coaches for an inflated price that captures the present value of occupying a space in a park with government-controlled rents.

B. Judicial Proceedings

On July 29, 1999, park owners Cashman and Guinn, filed a lawsuit in the District Court of Northern California alleging that Ordinance No. 680 constitutes a facially invalid regulatory taking under the Fifth Amendment to the United States Constitution. Cashman and Guinn alleged causes of action for declaratory relief, violation of 42 U.S.C. § 1983, injunctive relief, and inverse condemnation.

Ninth Circuit Court of Appeals precedent did not allow Cashman and Guinn to allege a substantive due process claim. "Substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996). *See Weinberg v. Whatcom County*, 241 F.3d 746, 749 n.1 (9th Cir. 2001); and *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999). When this case was filed, and throughout its

long litigation history, Ninth Circuit precedent provided that a premium-based facial attack to a rent control ordinance is properly brought as a Takings claim. *See Richardson v. City and County of Honolulu*, 124 F.3d at 1164-66.

Soon after the lawsuit was initiated, Cotati filed a motion to dismiss. The district court granted the motion, without prejudice as to the claims for damages, but denied the remainder of the motion to dismiss. Cashman and Guinn brought a motion for summary judgment, whereupon the district court, applying a substantial advancement test that examined the effect of the operative provisions of the ordinance, held that Ordinance No. 680 created an unconstitutional taking. Pet. App. H-1, 14-18. On Cotati's motion, the Court subsequently amended its judgment, and then vacated the judgment entirely after the Ninth Circuit Court ruled in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001).

The district court interpreted *Chevron USA, Inc. v. Cayetano* to require the park owners to demonstrate a likelihood that a sales premium that can be captured by mobile home park tenants prevents the ordinance from substantially advancing a legitimate state interest.

The District Court's Decision After Trial

Following a five-day bench trial, the district court entered judgment for the City of Cotati. Pet. App. C. The trial court held, in relevant part, that Ordinance No. 680 does not, on its face, constitute a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitutions.

The court found no dispute regarding the fact that economic theory explains how Ordinance No. 680 will enable existing tenants to capitalize and sell the right to live in Cashman's and Guinn's parks at artificially depressed rents. Pet. App. D-10. But the court found that Cashman and Guinn

had not shown that the ordinance created or was likely to create premiums in coach sales prices. *Id.* at 20. The court labored under the misconception that a reasonable expectation that sales premiums will arise cannot be established by expert testimony based on economic theory. Instead, the court required that the probability that premiums will arise be proved by empirical data regarding current sales prices of mobile home coaches in Cotati. Finally, the court determined that, even if Ordinance No. 680 created a premium, that premium would not keep the ordinance from advancing its legitimate government purposes. *Id.*

Appeal to the Ninth Circuit Court

The Ninth Circuit Court of Appeals reversed the trial court decision and remanded the case to the district court to reinstate the original judgment. *Cashman v. Cotati*, 374 F.3d at 899, Pet. App. F-22. The Ninth Circuit Court determined, in relevant part, that the district court abused its discretion in amending the original judgment after petitioners' motion for summary judgment; and the district court misapplied *Chevron*, 224 F.3d 1030, when it vacated the amended judgment. *Id.*

Cotati filed a petition for rehearing, but before the Ninth Circuit Court ruled on that petition, this Court granted certiorari in *Lingle v. Chevron*, 125 S. Ct. 2074, 2077 (2005). After the decision in *Lingle* was issued, Cotati's petition for rehearing was granted, and without further briefing or argument, the court reversed its ruling, and adopted the trial court's judgment after trial. The Ninth Circuit Court explained that "[t]he Supreme Court's opinion in *Lingle* requires us to grant the City of Cotati's petition for rehearing and to withdraw our opinion." Pet. App. B-1. The court explained that Petitioners' substantially advances regulatory takings claim "is foreclosed by *Lingle*." *Id.* at 2

Cashman and Guinn filed a petition for rehearing explaining that the Ninth Circuit Court misapprehended the effect of this Court's decision in *Lingle*, and that *Lingle* did not

require reversal of the court's decision in this case. Petitioners argued that the facts they had established at summary judgment should now be evaluated as setting forth a substantive due process violation—a violation which they could not raise in the Ninth Circuit prior to *Lingle*. The park owners' petition for rehearing was denied. Pet. App. E.

REASONS FOR GRANTING THE WRIT

This Court has not addressed the viability of the version of the substantially advances a legitimate state interest test that was endorsed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and pled and argued in Petitioners' case. This case presents important questions of federal regulatory takings law that should be resolved by this Court.

I

THE "SUBSTANTIALLY ADVANCES" TAKINGS ANALYSIS UPON WHICH PETITIONERS INITIALLY PREVAILED BEARS NO RESEMBLANCE TO THE TEST ANALYZED BY THIS COURT IN *LINGLE v. CHEVRON*

For twenty-five years the question whether a law substantially advances a legitimate state interest has been analyzed under the rubric of the Takings Clause of the Fifth Amendment to the United States Constitution. *See Lingle v. Chevron*, 125 S. Ct. at 2077; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (A land use regulation effects a taking if the regulation fails to substantially advance a legitimate state interest.). Last term, this Court held that one form of the substantially advances test is not a stand alone Takings test; it is a due process test.

The kind of substantially advances test addressed by this Court in *Lingle* is one that requires a court to decide whether a regulation furthers its intended purposes, or any legitimate government purpose. This Court explained that "the language the Court selected [in *Agins*] was imprecise. It suggests a means-ends test, asking, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Id.* at 2076.

The test advanced by Petitioners is not concerned with whether an ordinance accomplishes or is likely to accomplish its stated or unstated purposes. Rather, Cashman and Guinn urge application of the test described in *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3. The *Nollan* test looks at the *effect* of an ordinance—in this case, the creation of a premium—and determines whether that premium furthers the objectives sought to be achieved by the rent control ordinance.

A. The Analysis Advanced by Petitioners Is Rooted in Takings Law

The *Nollan* substantially advances test examines the cause-and-effect relationship of a land use regulation and the social evil the regulation seeks to remedy. *Nollan v. California Coastal Commission*, 483 U.S. at 834-35. This *Nollan* test entails a standard of scrutiny very different from the rational basis test. *Id.* at 834 n.3 (distinguishing the "substantial advancement" standard from the more deferential review applied to due process or equal protection claims).

In *Yee v. City of Escondido*, 503 U.S. at 530 Justice O'Connor explained how the substantial advancement test should apply to challenges to mobile home rent control ordinances. The park owners in *Yee* took a position that the transfer of a property interest resulting from the rent control ordinance effected a physical taking. *Id.* at 527. The Court rejected that argument, but Justice O'Connor—citing to the work of Dr. Werner Hirsch (Cashmans' & Guinns' economic

expert at trial)—noted that the effect of the rent control ordinance, coupled with restrictions on the ability to reject new tenants, is to create a premium that can be captured by the initial tenants when they sell their coaches. Justice O'Connor continued:

> [P]etitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on ***whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.***

Id. at 530 (emphasis added).

Thus, whether an ordinance will facilitate the capitalization and sale of the monetary benefits it creates is determined by examining the general scope and dominant features of the rent control law in question. The presence of three factors—government-controlled rents, the division of ownership of legal interests, and lessees' ability to transfer the right to controlled rents—allow a mobile home coach owner to realize a premium upon the sale of his coach. These three factors are present in cases where the courts accept, as a matter of law, (1) that the existence of particular facts enables incumbent tenants to monetize and capture the present value of reduced rents, and (2) that allowing tenants thus to "cash in" the full expected benefits of the regulation will prevent rent control from substantially advancing its policy objectives. *See Richardson*, 124 F.3d at 1163-65.

Petitioners proved that the City's rent control ordinance creates a situation where universal economic laws establish that a premium will, in fact, be captured by Petitioners' tenants. *See Cashman v. City of Cotati*, 374 F.3d at 899, Pet. App. F-21. All that is needed to prevent Cotati's ordinance from substantially advancing its objectives is the capitalization and sale of the

benefits of living under the ordinance by incumbent mobile home coach owners. Whether the ordinance will facilitate such transfers logically can be inferred from examining the face of the ordinance itself. In granting summary judgment in the case at bar, the trial court correctly determined that there is no mechanism by which a mobile home park owner can prevent a mobile home coach owner from capturing the value of below-market rents in the form of a sales premium. *See* Pet. App. H-17. The reasonably foreseeable creation and transfer of such premiums, and the effect of this phenomenon on any implied or asserted government interest, were properly decided as a matter of law. *See id.* at 18.

Almost any land-use regulation can be drafted in such a way that it will necessarily accomplish one or more of its stated objectives. But under the *Nollan* substantial advancement test, a court must determine the true nature of a regulation by "examin[ing] the operative provisions of a statute, not just its stated purpose." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922). And if the true nature or effect of a regulation is to transfer private property without compensation, the essential connection or cause-and-effect relationship required by takings law is absent.

The analysis advanced by Petitioners is particularly suited to facial takings claims, where a court looks only to a regulation's general scope and dominant features and not to the effect of the application of the regulation in specific circumstances. *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981) (finding a facial challenge to inquire "whether the 'mere enactment' of the [statute] constitutes a taking"). Indeed, facts as to the effect of a regulation in specific circumstances are oftentimes not available in facial takings challenges. At the time this case was filed, 42 U.S.C. § 1983, required that a claim be filed within

one year of adoption of the ordinance. *See Richardson v. City and County of Honolulu*, 124 F.3d at 1154, where a facial challenge to an ordinance was filed the very day it was enacted.

B. The *Nollan* Test Advanced by Petitioners Does Not Raise the Concerns Expressed by the Court in *Lingle*

In *Lingle*, this Court discussed why the ends-means substantially advances test in that case is not properly analyzed under a takings theory. A test that seeks to determine whether an ordinance accomplishes its objectives does not provide evidence (1) of a direct government appropriation; (2) of a compensable regulatory taking; or (3) about the magnitude and character of the burden imposed on private property rights and how the regulatory burden is distributed among property owners. *See Lingle*, 125 S. Ct. at 2076.

Application of the *Nollan* cause-effect test advanced by Petitioners creates no such difficulties. By examining the effect of the operative provisions of an ordinance (here, the creation of a premium which cannot be recovered by the property owner), the cause-effect test provides evidence of a direct government appropriation. Government can choose whether to rescind the law or keep the law in place and pay compensation in an amount to be proven in an as-applied (versus facial) takings claim. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317 (1987). And the *Nollan* cause-effect test demonstrates the magnitude and character of the burden imposed on private property rights and how the entire regulatory burden of Cotati's rent control program is distributed among three property owners. The burden of regulation must not fall disproportionally on those who did not cause the problem, when, " 'in all fairness and justice, [the burden] should be borne by the public as a whole.' " *Nollan v. California Coastal Commission*, 483 U.S.

at 836 n.4 (citing *Armstrong v. United* States, 364 U.S. 40, 49 (1960)).

Nor does the test advanced by Petitioners require that courts substitute their judgment for that of the Legislature. In *Pennsylvania Coal Company v. Mahon*, 260 U.S. at 415, Justice Holmes recognized that an exercise of the police power can be a taking. Takings claims do not examine whether government has chosen a means that exceeds the police power to accomplish a particular purpose. The formulation of legislative policy is entitled to judicial deference, but takings claims are different.

In this case, Cotati's rent control ordinance cannot be applied in such a way as to avoid a taking of private property. This determination requires a court to determine the existence of the factors that lead to the creation of a premium; it does not require that a court examine the wisdom or the effectiveness of rent control. A fundamental premise of constitutional law is that it is up to the courts to determine the constitutional validity of legislation. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). "When a claim for just compensation is made under the takings clause, . . . deference is neither appropriate nor permitted. Under our system of government, the court, not the legislative body or the electorate, must determine whether governmental action impermissibly invades rights protected by the constitution." *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 19 Cal. 4th 952, 1006 (1999) (Baxter, J., dissenting) (citing to *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964)). Courts can apply the heightened takings standard, while still maintaining the appropriate deference to legitimate government efforts to regulate the use of private property.

Petitioners respectfully request that this Court grant the petition so as to recognize the distinction between the substantially advances test considered and rejected as a takings

test in *Lingle*, rule that there is a place in regulatory takings law for a *Nollan* cause-effect test, and confirm that Cotati's ordinance works an unconstitutional taking of private property under the Fifth Amendment.

II

PETITIONERS' SUCCESSFUL PRE-*LINGLE* SUBSTANTIALLY ADVANCES CLAIM SHOULD BE REMANDED AND RESOLVED AS A DUE PROCESS CLAIM

The *Lingle* decision placed this case on unusual procedural footing. For the past ten years the Ninth Circuit has employed the doctrine of preemption to limit use of the Due Process Clause in takings cases. *See Armendariz v. Penman*, 75 F.3d at 1324. That doctrine prohibits substantive due process consideration where another provision provides an explicit textual source of constitutional protection. *Id.* at 1325-26. Prior to *Lingle*, the Ninth Circuit expanded this by finding an "explicit textual source" of protection for substantial advancement claims within the Takings Clause. *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997). As a result, where there is a takings claim involving the substantial advancement test, substantive due process review is precluded in the Ninth Circuit.

The Ninth Circuit Court extended preemption based upon the understanding that "a land use restriction that does not 'substantially advance legitimate state interests' . . . effects a taking." *Id.* Not so, according to *Lingle*. Rather, substantial advancement "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Lingle v. Chevron*, 125 S. Ct. at 2084. The test is more properly one of validity under the Due Process Clause. *Id.*

The sudden reversal of well-established takings law leaves Petitioners in an unusual position. When this suit began, the substantially advances test was a takings inquiry. Cashman and Guinn stated a viable substantially advances claim: a claim that survived a motion to dismiss (based on Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6)), upon which summary judgment was initially granted, and that prevailed on appeal to the Ninth Circuit Court of Appeals).

Petitioners beginning their case today would have no problem pleading a substantive due process claim, but here they have one procedural foot in the old system and one in the new. They did not forego due process review because they believed it unworthy of judicial attention but because they were prohibited from stating the claim. *Lingle* recognizes that a successful substantial advancement argument "has some logic" as a test of validity under due process. *Lingle*, 125 S. Ct. at 2083. The legal conclusion that Cotati's mobile home rent control law violates the Constitution by failing to substantially advance legitimate state interests holds true, regardless of whether that claim is denominated as a takings theory or a due process theory.

As noted by this Court, *Lingle* involved facts that precluded the certainty that the rent law, on its face, would transfer a valuable property interest from owners to tenants. *Lingle v. Chevron*, 125 S. Ct. at 2084-85. In this case, by contrast, Petitioners proved that the City's rent control ordinance creates a situation where universal economic laws establish that a premium will, in fact, be captured by Petitioners' tenants. *See Cashman v. City of Cotati*, 374 F.3d at 899, Pet. App. F-21. Thus, the Ninth Circuit Court can decide whether the facts proven in this case violate the "substantially advances" test as applied in the context of due process, just as it previously determined that the same facts gave rise to a regulatory taking.

Petitioners respectfully request that this Court remand this case to the Ninth Circuit Court of Appeals so that Petitioners may have the chance to demonstrate that they proved the very constitutional violation that they were prohibited from bringing at the outset.

CONCLUSION

The petition for writ of certiorari should be granted, or alternatively, this Court should remand the case for further proceedings.

DATED: November, 2005.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENE CASHMAN; ET AL.,

Plaintiffs-Appellants,

v.

CITY OF COTATI, a municipal corporation,

Defendant-Appellee.

No. 03-15066

D.C. No. CV-99-03641-SBA/RS

JUDGMENT

Appeal from the United States District Court for the USDC-CAO - U.S. DISTRICT COURT CALIFORNIA NORTHERN.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment in this cause be, and hereby is AFFIRMED.

Filed and entered 07/15/05

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENE CASHMAN; ATHENA SUTSOS, *Plaintiffs-Appellants,* v. CITY OF COTATI, a municipal corporation, *Defendant-Appellee.*	No. 03-15066 D.C. No. CV-99-03641-SBA/RS Northern District of California, Oakland ORDER

Filed July 15, 2005

Before: Arthur L. Alarcon, Robert R. Beezer, and William A. Fletcher, Circuit Judges.

ORDER

This court suspended consideration of appellee's petition for rehearing and rehearing en banc pending the Supreme Court's issuance of a decision in *Lingle v. Chevron USA*, --- U.S. ----, 125 S. Ct. 2074, 161 L.Ed.2d 876 (2005). The Supreme Court's opinion in *Lingle* requires us to grant the City of Cotati's petition for rehearing and to withdraw our opinion filed July 15, 2004.

We affirm the district court's judgment in favor of the City of Cotati. *See, e.g., Lentini v. California Center for the Arts*, 370 F.3d 837, 850 (9th Cir. 2004) (affirming district court's

judgment after trial on a different ground). Cashman's takings claim, which alleges that the City of Cotati's mobilehome park rent control ordinance effects an unconstitutional regulatory taking by failing to substantially advance a legitimate government interest, is foreclosed by *Lingle*. 125 S. Ct. at 2087 (holding that the "substantially advances formula is not a valid takings test" (internal quotation marks omitted)).

The petition for rehearing is GRANTED. Our prior opinion filed July 15, 2004 is WITHDRAWN. The district court's judgment in favor of the City of Cotati is AFFIRMED.

Appendix C–1

FILED September 10, 2002
Richard W. Wieking, Clerk, U.S. District Court,
Northern District of California, Oakland

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENE CASHMAN; ATHENA SUTSOS, Plaintiffs, v. CITY OF COTATI, a municipal corporation, Defendant.	No. C 99-03641 SBA **JUDGMENT** *Defendant's Counsel are directed to serve this order upon all other parties in this actions.*

In accordance with this Court's findings of fact and conclusions of law, and pursuant to federal Rule of Civil Procedure 58,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT judgment is ENTERED in the above-captioned action in favor of Defendant City of Cotati and that Plaintiffs Gene Cashman and Athena Sutsos shall take nothing from this action.

IT IS SO ORDERED.

Dated: September 4, 2002

/S/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

FILED
SEP 10 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENE CASHMAN,
ATHENA SUTROS
Plaintiffs,

v.

CITY OF COTATI,
Defendant.
_____/

No. C 99-03641 SBA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on trial before the Court. Having heard, read, and considered all of the evidence admitted and the parties' arguments and being fully informed, the Court hereby makes the following findings of fact and conclusion of law.

I. Procedural History

Plaintiffs Gene Cashman and Athena Sutros ("Plaintiffs") filed the present actior on July 29, 1999, alleging that the Defendant City of Cotati's ("Defendant" or "Cotati") Ordinance No. 680, Chapter 19.14 of the Cotati Municipal Code ("Ordinance No. 680"), constitutes on its face an unconstitutional regulatory taking under the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiffs sought declaratory and injunctive relief as well as damages. The matter was assigned to Judge William Orrick of this Court. On January 25, 2000, the Court granted in part and denied in part Defendant's motion to dismiss, finding that Plaintiffs' damages claim was not ripe but that their facial constitutional challenge for injunctive and declaratory relief was properly before the Court. On June 21, 2000, the Court granted Plaintiffs' motion for summary judgment, finding that

Ordinance No. 680 constituted an unconstitutional taking as a matter of law under the Ninth Circuit's holding in *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). Subsequently, the Ninth Circuit issued its opinion in *Chevron v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), which clarified *Richardson*. On June 18, 2001, relying upon *Chevron*, the Court granted Defendant's motion for reconsideration under Federal Rule of Civil Procedure 60 and vacated its June 21, 2000 order and judgment.[1] The matter was then set for trial. On December 7, 2001, the matter was re-assigned to this Court. From March 13, 2002 through March 20, 2002, this Court received evidence at a bench trial. The parties prepared post-trial briefs.

II. Findings of Fact

Based upon the testimony and evidence admitted at trial, the Court hereby finds that:

A. Undisputed Facts

1. Plaintiffs own mobilehome parks in Cotati.

2. In 1979, Cotati enacted a general rent stabilization ordinance, Chapter 19.12 of the Cotati Municipal Code ("1979 Ordinance"). (Pls' Ex. 3, Def's Ex. A.)

3. Cotati enacted the "Mobilehome Park Space Rent Stabilization Program" on September 23, 1998, Ordinance No. 680, Chapter 19.14 of the Cotati Municipal Code to replace the 1979 Ordinance.

4. Ordinance No. 680 includes both rent control and vacancy control provisions.

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[1] Neither party has argued that any of Judge Orrick's rulings constitute the "law of the case."

5. The rent control provision states:

> Except as provided in subsections (b) and (c) of this section, from and after the effective date of this chapter, the space rent payable for use or occupancy of any mobilehome space shall not be increased within twelve (12) months of the effective date of any preceding rent increase,
>
> Said increase shall not exceed
>
> (I) one hundred (100) percent of the percent change in the Consumer Price Index, or
>
> (ii) six percent, whichever may be less.

Ord. No. 680, 19.14.004(a).

6. The vacancy control provision states: "Except as otherwise provided in this Sec. 19.14.150, a mobile home park owner shall not charge a new base rent or increase the rent for a mobile home space because that space has become vacant or the tenancy with respect to the space has terminated." Ord. No. 680, 19.14.150(a).

7. Ordinance No. 680 contains the following stated purposes:

> (1) prevent exploitation of the shortage of vacant mobilehome park spaces;
>
> (2) prevent excessive and unreasonable mobilehome park space rent increases;
>
> (3) rectify the disparity of bargaining power which exists between

mobilehome park residents and mobilehome park owners;

(4) provide mobilehome park owners with a guaranteed rate of annual space rent increase which accurately reflects the rate of inflation and increases in their expenses; and

(5) provide a process for ensuring mobilehome park owners a fair, just, and reasonable rate of return on their parks in cases where the guaranteed annual space rent increase provided by this chapter proves insufficient.

(6) provide continued rent control through the transfer of a mobilehome-on-site (i.e., on the mobilehome pad) to a new mobilehome owner to prevent exploitative rental increases which take place when vacancy decontrol is either in effect or practiced by park owners.

(7) provide options in the duration of tenancies to prospective mobilehome tenants to prevent oppressive adhesion contracts from being imposed upon new park tenants.

Ord. No. 680, 19.14.001(d).

8. Ordinance No. 680 provides the following factual findings:

(a) In 1979, the people of the City of Cotati enacted by initiative a rent stabilization ordinance which had as its

purpose the control and stabilization of rents charged by owners of residential rental property, including mobile home parks. That rent stabilization ordinance has remained in effect to the present time. As to rents charged for mobile home spaces in mobile home parks, among others, the ordinance has achieved and continues to achieve its objective to control the amount of rent charged by mobile home park owners for the rental of mobile home spaces.

(b) As a result of a settlement agreement entered into by and between the City and the petitioners in the case entitled *152 Valparaiso Associates, et al. v. City of Cotati, et al.*, the City Council has placed the question of repealing said 1979 rent stabilization ordinance on the ballot for November 3, 1998 in the event said rent stabilization ordinance is repealed by the voters on November 3, 1998, the beneficial protections afforded by that ordinance to mobile home owners will be eliminated. For the reasons stated herein below and those adduced during the public hearings concerning this chapter, the City Council has determined that if the 1979 rent stabilization ordinance is repealed by the voters on November 3, 1998, as to mobile home space rentals, it is necessary to replace same with this chapter.

(c) The City Council finds the following facts to be true and makes these factual findings in support of the adoption of this chapter:

(1) Almost all of mobilehomes in the City are located in rented spaces in mobilehome parks.

(2) In the City, there are 3 mobilehome parks containing 107 spaces.

(3) Mobilehomes in mobilehome parks provide an important alternative form of housing for City residents.

(4) A significant number of mobilehome park residents are older individuals.

(5) A significant number of mobilehome owners are on fixed incomes.

(6) A significant number of mobilehome owners are low or lower income.

(7) Nearly all mobilehome park residents own and occupy their mobilehomes and have made a substantial monetary investment to live in a mobilehome park.

(8) Residents of a mobilehome park have very limited mobility due to the difficulty and expense of relocating a mobilehome.

(9) There is a limited amount of alternative housing affordable to and suitable for the typical mobilehome park resident and mobilehome parks are a valuable resource of affordable housing.

(10) The vacancy rate among mobilehome park spaces is 0%. Given the low vacancy rate, it is extremely difficult for mobile home owners to move their mobile homes in the event they are evicted or must find alternative mobile home spaces because of escalating and unreasonable rents being charged for the space where their mobile homes are currently located. This has been especially true for elderly persons living on fixed social security or retirement incomes.

(11) Without the City's 1979 rent stabilization ordinance being in place, the vacancy rates cited above and vacancy rates which Cotati mobile home parks have historically enjoyed would have given mobilehome park owners a virtual oligopoly where market forces do not influence space rental pricing.

(12) Under the County of Sonoma's voluntary mediation program for the resolution of mobilehome rent disputes, between 1985 and 1987, park owners proposed annual rent increases averaging 9.6%, nearly four times the rate of general price increases according to the CPI for Sonoma County. After

mandatory arbitration was established, and a rent control chapter was adopted in the County, requested rent increases were generally twice or more of the approved rent increases. Approved rent increases, on the average, began to mirror the CPI.

(13) As to mobilehome space rents in particular, the 1979 rent stabilization ordinance has succeeded in its broad objectives and rent stabilization laws should be enacted to continue such beneficial results in the event that said 1979 rent stabilization ordinance is repealed in November 1998.

(14) Since the adoption of the 1979 rent stabilization ordinance, the City has construed its provisions as requiring vacancy control: that is, upon the tenant's vacating of a rental unit or rental space, his/her successor tenant is entitled to the same rent previously charged to the vacating tenant. The City Council finds that it would be desirable to continue to provide prospective mobilehome park tenants with an option to chose between a long-term lease and a periodic tenancy of less than one year in duration. The terms offered under typical long-term leases by some park owners are excessively long, oppressive, one-sided adhesion agreements. Such an option furthers a legitimate governmental objective and is not in conflict with or preempted by state law.

> Furthermore, the sale of mobilehomes on site subjects mobilehome coach owners to unreasonably suppressed resale rates due to oppressively high rental adjustments upon rent de-control. The City Council finds that it would be desirable to continue to provide vacancy control in its rent stabilization program as hereunder provided.
>
> (15) The City Council further finds that there has been and continues to be a shortage for the relocation of mobilehomes in the City, a condition which results in very low vacancy rates and tends to prevent normal competition between the owners and tenants of mobilehome parks. The need for effective and fair mobilehome park space rent stabilization continues to exist in Cotati in 1998 as it did in1979.

Ord. No. 680, 19.14.001(a)-(c).

9. Ordinance No. 680 became effective on December 19, 1998, upon the repeal of the 1979 Ordinance by referendum on November 3, 1998.

10. Plaintiffs are subject to the provisions of Ordinance No. 680.

11. Mobilehomes are located in mobilehome parks. Generally, there is divided ownership between the land upon which a mobilehome sits ("pads") and the mobilehome coach itself. The pad is owned by the mobilehome park owner ("park owner"). The mobilehome coach is owned by a separate individual ("coach owner"). (Tr. Vol. I, 75:11-15; Pls' Ex. 6 at 405-406; Pls' Ex. 8.)

12. Based upon the testimony of Plaintiffs' expert Werner Hirsch, Ph.D. ("Dr. Hirsch") and Defendant's experts Stephen Lewis, Ph.D. ("Dr. Lewis"), Robert Edelstein, Ph.D. ("Dr. Edelstein"), and Kenneth Baar, Ph.D. ("Dr. Baar"), under a capitalization theory, if a rent stabilization ordinance holds rents below market rent and provides that rents shall not increase upon termination of the tenancy, the present owner of the mobilehome may capture a "premium" from the buyer upon resale of the mobilehome. The premium is the difference between market rent and the value of the mobilehome given the below-market rents created by rent and vacancy control. (Tr. Vol. I, 75:16-22, 81:1-9; Tr. Vol. II, 43:10-19; Tr. Vol. III 82:21-83:1; Tr. Vol. IV, 29:15-30:2.) *See also Richardson*, 124 F.3d at 1164-65 (describing premium as difference between renegotiated land rent and the free market land rent).

B. Disputed Facts

13. Based upon the following evidence, the Court FINDS that there is no persuasive evidence that Ordinance No. 680 creates or is likely to create a premium in connection with the resale of mobilehome coaches located in the mobilehome parks in Cotati:

a. In support of their argument that Ordinance No. 680 creates a premium, Plaintiffs' rely solely on the testimony of Dr. Hirsch, their expert on the creation of premiums by mobilehome rent control ordinances. Dr. Hirsch testified that based upon common sense, the economic theory of capitalization, empirical studies using regression analysis which he conducted in the 1980's and early 1990's, and deductive reasoning, Ordinance No. 680 is likely to create a premium in Cotati. (Tr. Vol. I, 76:23-77:2; Pls' Ex. 11.) Although the Court finds that Dr. Hirsch demonstrates a knowledge of the economic theory of capitalization and its general effects in California, his testimony is not persuasive in

the context of whether Ordinance No. 680 creates a premium in Cotati.

b. Dr. Hirsch conducted two empirical studies employing regression analysis: (1) a state-wide study covering the period 1982-1984 and (2) a study of mobilehome park in Oceanside, California covering the years 1986-1992. (Tr. Vol. I, 81:24-83:1, 87:17-88:15, 89:12-99:10; Pls' Exs. 6-8.) These studies demonstrated that rent control ordinances created a premium upon resale of the mobilehome coach. (Pls' Ex. 6-8.) However, Dr. Edelstein, Defendant's expert on regression analysis, testified that he was skeptical of Dr. Hirsch's state-wide and Oceanside empirical studies. (Tr. Vol. III, 14:14, 14:24-15:3.) For instance, Dr. Edelstein found that Dr. Hirsch's reliance upon 333 mobilehome coach sales in his state-wide regression analysis was too small a sample size, implicating the accuracy of the data used. (Tr. Vol. III, 15:11-16-12; 26:11-21.) He also testified that Dr. Hirsch's regression analysis may have omitted critical variables or that he failed to consider the inter-correlation of key variables which is vital to determining the possibility of the creation of a premium. He further opined that Dr. Hirsch failed to adequately account for "simultaneity" of variables which affects the magnitude of the coefficient of a particular variable. (Tr. Vol. III, 21:1-24:1; 26:3-26-10.) The Court finds that despite Dr. Edelstein's criticism, Dr. Hirsch's studies are credible. It notes that his state-wide study was peer reviewed and has been cited by competent legal authority. (Tr. Vol. I, 88:15-19.) *See also, Yee v. City of Escondido*, 503 U.S. 519, 530, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (citing Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 405 (1988)). Further, in relation to Dr. Edelstein's criticism, Dr. Hirsch testified that his Oceanside study was not distorted by inter-correlation given the fact that the data came

from a single mobilehome park which limited the importance of ostensibly "omitted" variables. (Tr. Vol. I, 94:13-95:19.)

c. Dr. Hirsch's opinion that Ordinance No. 680 will create a premium in Cotati is based upon his prior studies and a comparison of Cotati's rent control ordinance with the ordinances he studied in conjunction with his earlier studies. This opinion is afforded little weight. Dr. Hirsch did not conduct any empirical studies of *Cotati* in connection with the present action: he did not collect data on mobilehome sales in Cotati or Sonoma County or of mobilehome park rents in Cotati or Sonoma County; nor did he collect data on the demographics of mobilehome coach owners on housing prices in Cotati. (Tr. Vol. I, 119:19-120:19, 127:10.) He did not perform a regression analysis on the effects of Ordinance No. 680. (Tr. Vol. I, 121:10-11.) Further, he is uncertain whether any of the sales which formed the basis of his earlier state-wide study occurred in Cotati. (Tr. Vol. I, 82:24-83:1, 116:10-14.)

d. Dr. Edelstein, testified that it is a leap of faith to draw conclusions about Cotati based upon Dr. Hirsch's two previous studies. (Tr: Vol. IV, 14:2-15.) For instance, Dr. Edelstein opined that the housing market in Cotati could have changed during the decade between Dr. Hirsch's state-wide analysis and the present conditions in Cotati. (Tr. Vol. IV, 27:18-1.) He also testified that the difference between mobilehome markets throughout the state, for example, from Cotati to Malibu to Orange County, could greatly impact the price of mobilehomes, which undermines a conclusion about the existence of a premium in a specific jurisdiction based upon a state-wide study. (Tr. Vol. IV, 47:3.) Dr. Edelstein further concluded that in order to determine the effects of capitalization in a micro market, it is necessary to collect data about the particular market—e.g., whether there is an uncertainty as to the continuation of rent control in Cotati, how the mobilehome market fits into the general housing market, etc. (Tr. Vol. IV, 61:17-23.) While Dr. Hirsch testified that empirical evidence

is not necessary to support his opinions (Tr. Vol. I, 147:1-19), he failed to explain why simple deduction from the state-wide or Oceanside studies would be sufficient. Finally, the Court notes that Mr. John Patrick Neet, Plaintiffs' rebuttal expert on the issue of appraisals, conceded that in order to determine the "local market value" of a mobilehome coach in the context of appraisal, it is necessary to evaluate the characteristics of the particular location of the mobilehome parks, e.g., Cotati. (Tr. Vol. IV, 102:19-25.) Accordingly, the Court finds that Dr. Hirsch's state-wide and Oceanside empirical studies do not support a conclusion that Cotati's rent control ordinance creates a premium.

e. Dr. Lewis, Defendant's expert on the existence of a premium as a result of Cotati's rent control, testified that he collected data on 1,700 sales of mobilehome coaches in Sonoma County including Cotati from 1987 through 1989 in order to conduct a study commissioned by Cotati. (Tr. Vol. II, 42:17-23; Def's Ex. B.) Cotati commissioned the study to determine whether a premium was generated as a result of its 1979 Ordinance which was applicable to mobilehomes. (Tr. Vol. II, 76:4-16.) As discussed below, the 1979 Ordinance had the same effect and operative provisions as Ordinance No. 680. *See, infra*, ¶ 17. Dr. Lewis collected the data from jurisdictions which had rent control and those which did not. (Tr. Vol. II, 42:24-43:1.) Dr. Lewis performed a regression analysis on the data collected. (Tr. Vol. II, 43:4-5.) Based upon Dr. Hirsch's state-wide study, Dr. Lewis anticipated that the results would demonstrate the existence of a premium in connection with the sales of coaches in jurisdictions with rent control. (Tr. Vol. II, 43:6-23.) However, Dr. Lewis' study found that there was no evidence of a premium in sales of mobilehome parks in jurisdictions with rent control, including Cotati. (Tr. Vol. II, 47:13-48:9; Def's Ex. B at 1-2.) In fact, the study found that the resale prices in rent control jurisdictions were lower than prices in the jurisdictions which lacked rent control ordinance.

(Tr. Vol. II, 48:10-12; Def's Ex. B at 2.) Plaintiffs offered no testimony or evidence to rebut Dr. Lewis' testimony. The Court finds Dr. Lewis' testimony persuasive because it applied a well-accepted regression analysis to empirical data of Sonoma County, including Cotati.

f. Mr. James Brabant ("Brabant"), Defendant's expert on the existence of a premium caused by Ordinance No. 680, testified that his analysis of actual mobilehome sales in Sonoma and Napa Counties, including Cotati, did not reveal the existence of a premium. (Tr. Vol. II, 86:10-12.) As a professional appraiser, Mr. Brabant has appraised nearly 1,000 mobilehome coaches in his thirty-year career. (Tr. Vol. II, 80:1-3; 85:14-15.) Mr. Brabant conducted four studies to determine whether a premium was created by Ordinance No. 680. (Tr. Vol. II, 92:5-8; Def's Ex. C at 21.) In conjunction with the studies, Mr. Brabant collected general background information including the demographics of mobilehome coach owners and historic rent increases for mobilehomes in Sonoma County as well as a telephone survey of 4,674 spaces in thirty-seven mobilehome parks located in Sonoma County. (Tr. Vol. II, 87:6-88:20; Def's Exs. F-H.) He also collected voluminous sales data for mobilehome coach sales in Sonoma County. (Tr. Vol. II, 89:20-91:4; Def's Exs. I-T.) Mr. Brabant conceded that while none of his four studies by itself was "completely conclusive," together they formed a basis to support the conclusion that there was no evidence of a premium created by Ordinance No. 680. (Tr. Vol. II, 102:19-25; Def's Ex. C.)

g. The first study considered the trend of average prices and price per square foot of mobilehome coaches in six Sonoma or Napa County jurisdictions before and after they adopted rent control ordinances. (Tr. Vol. II, 92:18-24; Def's Ex. C at 22-27.) The average sale price declined following the

imposition of rent control. (Def's Ex. C at 26-27.)[2] Mr. Brabant found no indication of any premium created as a result of rent control. (Tr. Vol. II, 94:22-1.) Cotati's mobilehome coach prices were consistent with the downward trend evidenced in the six Sonoma/Napa County jurisdictions surveyed. (Tr. Vol. II, 95:2-25.)

h. The second study compared the average price per square foot of mobilehomes in Cotati with the price of mobilehomes in Healdsburg, California from January 1, 1995 to July 25, 2001. (Tr. Vol. II, 96:2-4, 20-22; Def's Ex. C at 27-28.) Healdsburg is the only jurisdiction in Sonoma County which does not have rent control. Mr. Brabant opined that because Healdsburg and Cotati were both small towns with similar populations and property values in terms of rents and prices, they were comparable. (Def's Ex. C at 28.) Although the average price of homes in Cotati was slightly higher than in Healdsburg, the Healdsburg homes were on average six years older than the Cotati homes, which presumably resulted in lower prices. (Tr. Vol. II, 96:23-97:97; Def's Ex. C at 29.) Mr. Brabant testified that this study suggested that there was no premium. (Tr. Vol. II, 97:8-10).

i. The third study was a paired sales analysis which analyzes sales of two different homes in an attempt to isolate a single factor by making adjustments between the homes to make them otherwise equivalent. (Tr. Vol. II, 97:12-18; 100:10-13; Tr. Vol. IV, 121:17-124:2.) Mr. Brabant selected six mobilehomes in Cotati which Plaintiffs identified as being sold for a premium and compared them with six mobilehomes sold in Healdsburg around the same time. (Tr. Vol. II, 97:19-25.) Mr. Brabant personally inspected each mobilehome in order to ensure an accurate comparison. (Tr.

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[2] One city experienced a rise in mobilehome prices, but Mr. Brabant found this data unreliable and aberrational. (Tr. Vol. II, 94:6-21; Def's Ex. C at 26.)

Vol. II, 97:18-13.) On average the mobilehomes in Cotati sold for less than comparable homes in Healdsburg, suggesting that no premium was created by Ordinance No. 680. (Tr. Vol. II, 98:18-101:19.)[3]

j. Mr. Brabant's fourth study employed an analysis similar to the third study, the only difference being that he selected three additional mobilehomes recently sold in Cotati which were not identified by Plaintiffs. (Tr. Vol. II, 102:5-10; Def's Ex. C at 37-41.) The study also evidenced that on average, the mobilehomes in Cotati were sold at prices less than those in Healdsburg, which suggested that no premium was created. (Tr. Vol. II, 102:11-16; Def's Ex. C at 41.)

k. Mr. John Patrick Neet ("Neet"), Plaintiffs' rebuttal expert to Mr. Brabant, testified that Mr. Brabant's analysis was deficient and his conclusions erroneous because Mr. Brabant failed to sufficiently establish that Healdsburg and Cotati were comparable, he made too many adjustments of significant magnitude in his paired sales analysis, and some of the sales used in the paired sales analysis were to mobilehome park owners which undermined their usefulness. (Tr. Vol. IV, 116:22-119:18, 126:7-131:9, 137:4-138:15, 141:12-143:5, 145:11-17; Pls' Ex. 26.) The Court accords Mr. Neet's testimony little weight. Mr. Neet conceded that he has appraised only fifteen to twenty mobilehomes. (Tr. Vol. IV, 95:17-18.) He also agreed that in order to conduct a market value appraisal in connection with a paired sales analysis, it is necessary to evaluate issues specific to the mobilehome, including physical characteristics, the location of the home, market rent, and other particular characteristics. (Tr. Vol. IV, 102:19-25.) To this end, Mr. Neet conceded that he performed no market value appraisals in Cotati. (Tr. Vol. IV, 103:1-11;

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[3] Mr. Brabant disregarded an aberrational sale because he was unable to verify the information provided by Plaintiffs. (Tr. Vol. II, 101:19-102:3; Def's Ex. C at 37.)

Tr. Vol. 172:12-18.) Additionally, Mr. Neet's testimony was based in part on unverified information provided by Plaintiff Gene Cashman. (Tr. Vol. IV, 155:1-22; 156:16-157:2.) The Court finds that Mr. Neet's testimony is not persuasive.

l. The Court finds Mr. Brabant's testimony persuasive. Mr. Brabant has considerable experience appraising mobilehomes, collected a voluminous amount of data, and personally inspected the homes which formed the basis of his paired sales analysis. He concedes that while none of his tests may be individually conclusive, together they indicate that Ordinance No. 680 does not create a premium. Further, Mr. Neet's testimony in rebuttal was not persuasive for the reasons stated above. Thus, based upon his testimony and taking into account his considerable expertise, the Court finds his testimony persuasive and supports the finding that there is no indication that Ordinance No. 680 creates a premium.

m. Based upon the testimony and empirical studies of Dr. Lewis and the testimony and studies of Mr. Brabant, there is no persuasive evidence that Ordinance No. 680 creates or is likely to create a premium.

14. Based upon the following evidence, Court FURTHER FINDS that Ordinance No. 680 does not nor is it likely to inhibit the sale of mobilehome coaches or the construction of new mobilehome parks:

a. Dr. Hirsch testified that based upon common sense, his empirical studies, and deductive reasoning, Cotati's ordinance is likely to restrain the construction of new mobilehome parks in Cotati which negatively impact the affordability of homes. (Tr. Vol. I, 75:4-7, 104:110-107:25.) The Court finds Dr. Hirsch's testimony unpersuasive. Dr. Hirsch admitted that "deductively" he has an opinion that Ordinance No. 680 will impact the creation of new mobile home parks but that he "ha[s] no empirical evidence" to support his deduction. (Tr. Vol. I, 128:16-17.) Further, Dr. Hirsch

admitted that he had not performed any research on the feasibility of building new mobilehome parks in Cotati. (Tr. Vol. I, 129:14-19.) He also admitted that there may be other factors which inhibit new mobilehome parks, including local zoning ordinances. (Tr. Vol. I, 131:2-4.) Finally, Dr. Hirsch testified that he understood that California law exempts mobilehome parks built after 1995 from local rent control ordinances such that the "chilling effect" of any ordinances "might have gone away." (Tr. Vol. I, 5-18.)

b. Dr. Baar, Defendant's expert on public policy effects of rent control ordinances for mobilehome parks, testified that rent control ordinances do not limit investment in new mobilehome parks. In particular, he stated that modern zoning ordinances limiting the number of spaces in mobilehome parks as well as increased demand for other more profitable uses of land including condominiums or commercial development has altered the economics in relation to construction of mobilehome parks. (Tr. Vol. III, 34:19-36:2.) It is these factors which influence whether mobilehome parks will be built. (Tr. Vol. III, 36:9-10.)

c. Based upon the testimony of Dr. Baar and Dr. Hirsch, the Court finds that zoning laws and changing demographics make it unprofitable to construct new mobilehome parks. Ordinance No. 680 does not impact the decision to construct new mobilehome parks. This is supported by the fact that new mobilehome parks are exempt from rent control ordinances under California law.

15. Based upon the following evidence, the Court FURTHER FINDS that, as a matter of fact, Ordinance No. 680 will substantially advance the stated purposes of the ordinance:

a. Ordinance No. 680 includes seven stated purposes which are intended to protect the mobilehome coach owners as well as to ensure a fair return to mobilehome park owners.

b. Dr. Baar, testified that mobilehomes are essentially immobile units which are sold in place even though they are not legally tied to the land. (Tr. V ol. III, 32:2-5.) *See also Yee*, 503 U.S. at 523. This is a function of cost and the availability of spaces in mobilehome parks. The cost of relocation is very high and mobilehome owners often make substantial investments in the coaches in the spaces they occupy. (Tr. Vol. III, 30:18-8, 33:22-34:8; Def's Ex. X at 4-6.) More importantly, there are virtually no vacant spaces in mobilehome parks in the state to which an owner may move and no new mobilehome parks are being built because of zoning laws and economic changes. (Tr. Vol. III, 31:11-32:5, 34:13-36:10; Def's Ex. X at 6-9.) Dr. Baar based these opinions on data collected by the State of California. (Def's Ex. X.) Additionally, Mr. Brabant testified that of the 4,764 mobilehome spaces in Sonoma County which were identified in his survey, only five spaces were vacant, which computes to less than one-tenth of one percent. (Tr. Vol. II, 89:10-13.)

c. Dr. Baar opined that as a result of these conditions, mobilehome owners are vulnerable to exploitation by mobilehome park owners and lack any bargaining power. (Tr. Vol. III, 37:9-38:5.) In particular, even if the rent is significantly raised, mobilehome owners have the option to pay the rent, attempt to sell the coach which is subject to exorbitant rent increases which will limit buyers as well as the selling price, or to abandon the coach. (Tr. Vol. III, 37:9-38:5.) Further, a substantial portion of the residents of mobilehomes are elderly or low income persons who are even more vulnerable to exploitation. (Tr. Vol. III, 38:14-39:3; Def's Ex. X at 11.) The result of such exploitation is that the mobilehome owner will lose any investment in the coach. (Tr. Vol. III, 39:16-22.)

d. Dr. Baar's testimony is supported by the findings of fact made by Cotati in enacting Ordinance No. 680. Ord. No. 680, 19.14.001(c). In particular, as noted above,

Cotati made the specific factual findings that a significant number of mobilehome owners are elderly or are of low income. Ord. No. 680, 19.14.001(c)(5)-(6). Additionally, the mobilehome owners have made substantial monetary investments in their mobilehomes, there is limited mobility and the costs of relocation are high, and there is limited alternative housing affordable for the residents. Ord. No. 680, 19.14.001 (c)(7)-(9). Finally, Cotati explicitly found that the vacancy rate of mobilehome parks in the city was 0%. Ord. No. 680, 19.14.001(c)(10).

e. Dr. Baar testified that Ordinance No. 680 will advance the stated purposes of Ordinance No. 680. The first three stated purposes of preventing exploitation of the shortage of vacant mobilehome spaces, preventing excessive and unreasonable rent increases, and rectifying the disparity in bargaining power are all very similar. (Tr. Vol. III, 47:7-9.) Dr. Baar testified that Ordinance No. 680 will fulfill these purposes. (Tr. Vol. III, 44:19-45:4.) In particular, rent and vacancy control prevents mobilehome park owners from exploiting the shortage of vacant mobilehome spaces by extracting high rents. (Tr. Vol. III, 46:9-21.) This also serves the purpose of protecting mobilehome owners from the loss of their investments when they elect to sell the coach. (Tr. Vol. III, 46:22-47:1.) The rent control provision limits excessive rent increases and also equalizes the bargaining power. (Tr. Vol. III, 47:10-18.)

f. The fourth and fifth stated purposes are to ensure a fair rate of return to mobilehome park owners. (Tr. Vol. III, 47:19-48:2.) While Dr. Baar did not focus on these provisions in his analysis, he noted that the mechanism for ensuring a fair rate of return is consistent with rent control ordinances adopted in other jurisdictions in California. (Tr. Vol. III, 48:3-10.)

g. The sixth stated purpose is to provide continued protection through the transfer of the mobilehome. 19.14.001 (d)(6). Dr. Baar testified that because of the vacancy control provision, the benefits of the ordinance—limiting exploitation, preventing rent increases, ensuring parity in bargaining power—remain applicable during the transition process. (Tr. Vol. III, 48:13-25.) The seventh stated purpose, ensuring options are available to prospective mobilehome owners to prevent oppressive adhesion contracts, is related to the sixth purpose. (Tr. Vol. III, 49:3-6.)

h. Dr. Baar further testified that even if a premium were created, this would not impact the stated purposes of Ordinance No. 680. (Tr. Vol. III, 92:4-13.) In particular, the premium does not obstruct the stated purposes of Ordinance No. 680 which are to rectify the inequality in bargaining power and to prevent excessive rent increases. (Tr. Vol. III, 92:9-13.)

i. Dr. Hirsch conceded that he had no opinion as to whether Ordinance No. 680 fulfilled its stated purposes. (Tr. Vol. i, 124:4-13.) Further, Michael St. John, Ph.D. ("Dr. St. John"), Plaintiffs' rebuttal expert on the policy implications of Ordinance No. 680, testified that Ordinance No. 680 had the effect of increasing the bargaining power of mobilehome park residents vis-a-vis the park owners. (Tr. Vol. V, 54:25-55:1.)

j. For these reasons, the Court finds that Ordinance No. 680 will substantially advance its stated purposes. Dr. Baar's testimony is credible and persuasive and is supported by data collected by the State of California, Mr. Brabant, and the factual findings made by Cotati. The rent control and vacancy control ordinance will prevent potential exploitation by park owners of the limited number of vacant mobilehome park spaces. It also prevents excessive rent increases during the tenancy as well as upon the transfer of

ownership. Additionally, Ordinance No. 680 furthers the purpose of protecting the mobilehome coach owners' investment in their mobilehome. Finally, the Court finds that even if Ordinance No. 680 created a premium, the premium would not impede the stated purposes of the Ordinance because a premium will not upset the bargaining power between the mobilehome park owner and the coach owner nor will it adversely effect the prevention of excessive rent increases, the protection of the mobilehome owners' investment in their coaches, or the continuation of these protections upon transfer of ownership.

16. Based upon the following evidence, the Court FURTHER FINDS that Ordinance No. 680 does not nor is it likely to adversely affect the existence of affordable housing in Cotati:

a. Dr. Hirsch testified that because of the existence of a premium, mobilehome coaches are not likely to become more affordable upon resale. (Tr. Vol. I, 99:19-101:3, 103:15-22.) However, the Court finds this testimony unpersuasive. Dr. Hirsch admitted that during his deposition he testified that he had no opinion as to what impact, if any, Ordinance No. 680 would have on affordable housing in Cotati. (Tr. Vol. I, 131:23-132:2.) Further, he also testified that he did not perform an empirical study of the demographics of mobilehome coach owners or the housing market in Cotati. (Tr. Vol. I, 120:9-19.)

b. Dr. Baar testified that even if a premium were created which was equal to the monthly savings created by rent control, a tenant would still gain other benefits which factor into the affordability of the mobilehome. (Tr. Vol. III, 84:4-21; Def's Ex. X at 14-16.) For instance, rent and vacancy control will protect the tenant's investment in the mobilehome. (Tr. Vol. III, 84:4-21, 85:14-19.) This in turn affects the financing available to prospective buyers because an important factor is

whether the value of the property—i.e., the mobilehome—will appreciate. (Tr. Vol. III, 91:14-20.)

c. Plaintiffs' rebuttal expert Dr. St. John testified that mobilehome park owners cannot exploit coach owners in the absence of rent control and that the existence of a premium negatively impacts the availability of affordable housing. (Tr. Vol. V, 27:24-28:12; 31:25-32:6; 33:1-20; 40:6-10, 17-19.) The Court finds that Dr. St. John's testimony is not credible or persuasive. Other than state his disagreement with Dr. Baar's hypothesis, Dr. St. John conducted no empirical studies or otherwise explained the bases of his conclusions. Dr. St. John was evasive and refused to answer questions asked. Further, the Court notes that Dr. St. John has testified exclusively for landlords in past litigation and admitted that he owns residential property which is subject to rent control. (Tr. Vol. V, 44:16-45:7.)

d. For these reasons, the Court finds that there is no persuasive evidence that Ordinance No. 680 does or is likely to adversely impact the availability of affordable housing. Preliminarily, there is no persuasive evidence of a premium. Additionally, even if a premium existed, there is no persuasive evidence that it would negatively impact affordable housing. Dr. Baar has persuasively testified that rent and vacancy control protects the mobilehome coach owners' investment in their mobilehomes. This benefit, as well as the related benefit of more available financing to purchase a mobilehome, increases the affordability of mobilehomes despite the existence of a premium. Thus, affordable housing will be protected by Ordinance No. 680.

17. Based upon the following evidence, the Court FURTHER FINDS that Cotati enforced the 1979 Ordinance consistent with the understanding that the ordinance provided for both rent control and vacancy control:

a. The 1979 Ordinance provides that "no landlord shall charge rent for any controlled rental units in an amount greater than the rent in effect on June 1, 1979, until and unless the rent ceiling is adjusted under Sections 19.12.50 and/or 19.12.60." 1979 Ord., 19.12.040. Section 19.12.050A of the 1979 Ordinance authorized the Cotati rent board to make a general rate adjustment of the maximum base rent. Section 19.12.050B of the 1979 Ordinance expressly stated:

> Annual Hearing on General Adjustments and Maximum Ceiling. No more than once annually, after proper notice, the board shall conduct hearings for the purpose of determining a general annual maximum rent adjustment. In making general maximum rent adjustments and imposing annual maximum rent ceilings, the board shall consider all relevant cost factors affecting rent-controlled units, including but not limited to the following:
>
> 1. Increases or decreases in property taxes;
>
> 2. Unavoidable increases or decreases in operating and maintenance expenses;
>
> 3. Capital improvement or the controlled rental unit, as distinguished from normal repair, replacement and maintenance;
>
> 4. Increases or decreases in living space, furniture, furnishings, or equipment;

5. Substantial deterioration of the controlled rental unit other than as a result of ordinary wear and tear;

6. Failure on the part of the landlord to provide adequate housing services or to comply substantially with the Cotati Housing Code and other applicable state and local statutes; and

7. The landlord's rate of return on investment.

1979 Ord., 19.12.050B.

b. Ordinance No. 680 expressly recites that:

Since the adoption of the 1979 rent stabilization ordinance; the City has construed its provision as requiring vacancy control: that is, upon the tenant's vacating of a rental unit or rental space, his/her successor tenant is entitled to the same rent previously charged to the vacating tenant. The City Council finds that it would be desirable to continue to provide prospective mobilehome park tenants with an option to chose between a long-term lease and a periodic tenancy of less than one year in duration. The terms offered under typical long-term leases by some park owners are excessively long, oppressive, one-sided adhesion agreements. Such an option furthers a legitimate governmental objective and is not in conflict with or preempted by state law. Furthermore, the sale of mobilehomes

> on site subjects mobilehome coach owners to unreasonably suppressed resale rates due to oppressively high rental adjustments upon rent de-control. The City Council finds that it would be desirable to continue to provide vacancy control in its rent stabilization program as hereunder provided.

Ord. No. 680, 19.14.001(c)(14).

c. Defendant's witness Jeffrey Walter, an attorney who serves as counsel for Cotati, testified that Cotati applied the 1979 Ordinance as though it imposed vacancy control. (Tr. Vol. II, 73:10-18.) He further stated that in 1998, the Cotati Rent Appeals Board sustained a complaint against Plaintiff Gene Cashman for raising the rent upon the termination of a tenancy. (Tr. Vol. IV, 86:19-87:2.) In particular, the Cotati Rent Appeals Board concluded that the 1979 Ordinance included a vacancy control provision which precluded a rent increase upon the termination of tenancy. (Tr. Vol. IV, 87:22-88:1.)

d. Dr. St. John testified that Ordinance No. 680 "piggy backs" on the 1979 Ordinance and opined that the effect of Ordinance No. 680 is the same as from the 1979 Ordinance. (Tr. Vol. V, 54:21-23.)

III. Conclusions of Law

The Court hereby CONCLUDES that,

A. Legal Standard for Regulatory Taking

1. Plaintiffs raise a facial challenge to Ordinance No. 680 under the Fifth and Fourteenth Amendments to the United States Constitution. A facial challenge contends the statute is unconstitutional in every application or prohibits such a broad range of conduct beyond the plaintiff's immediate

conduct that it is unconstitutionally overbroad. *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470,494, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)).

2. Plaintiffs bear the burden of proving that Ordinance No. 680 is facially unconstitutional. *Keystone*, 480 U.S. 470, 485.

3. The Takings Clause of the Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V.

4. The Takings Clause of the Fifth Amendment is applicable to states through the Fourteenth Amendment. *Dolan v. City of Tigard*, 512 U.S. 374, 383-84, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (citations omitted).

5. An unconstitutional taking falls within two categories: (1) physical taking and (2) regulatory taking. *Yee*, 503 U.S. at 522-23 (citations omitted). Plaintiffs assert that Ordinance No. 680 constitutes a regulatory taking.

6. Ordinance No. 680 will effect an unconstitutional regulatory taking if it (1) "does not substantially advance legitimate state interests . . . or [(2)] denies an owner economically viable use of his land.'" *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (citations omitted). Plaintiffs assert that Ordinance No. 680 implicates the first prong of the *Agins* test.

B. Substantial Advancement of Legitimate Government Interests:

Legitimate Governmental Interest

7. In determining what governmental interests a statute is intended to advance, a court must "examine the operative provisions of a statute, not just its stated purpose, in assessing,

its true nature." *Keystone*, 480 U.S. at 487 n.16; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The operative provisions of Ordinance No. 680 prevent rent increases beyond 6% or 100% of the CPI annually—i.e., rent control—and guarantees the continuation of rent control upon the expiration of the tenancy or transfer of ownerships of the mobilehome coach—i.e., vacancy control. Based upon the Court's findings of fact, these provisions further the stated purposes of Ordinance No. 680 to prevent exploitation of the lack of options available to mobilehome park residents and excessive rent increases, to equalize the disparate bargaining power, to guarantee a fair return to mobilehome park owners, to ensure continuation of rent control, and to prevent adhesive and excessive long-term lease arrangements. The Court CONCLUDES that the seven stated purposes of Ordinance No. 680 are the governmental interests the ordinance intends to further.

8. Based upon the express factual findings made by Cotati in Ordinance. No. 680, in particular, the findings that most mobilehome residents are of lower income and elderly and that they lack alternative affordable housing, coupled with the stated purposes of the Ordinance, the Court FURTHER CONCLUDES that Ordinance No. 680 is also intended to further the objective of providing and maintaining affordable housing to lower income and elderly residents of Cotati.

9. A "broad range of governmental purposes and regulations" may be considered legitimate governmental purposes in the context of the Takings Clause. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (citations omitted). The Ninth Circuit has recognized that "equaliz[ation] [of] the bargaining position of park owners and tenants," the protection of mobilehome owner's investments in their property, and prevention of "unconscionable and coercive changes in rental rates" are legitimate governmental interests in the context of

mobilehome rent control ordinances. *Levald*, 998 F.2d at 690 (citing *Pennell v. City of San Jose*, 485 U.S. 1, 13-44, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988)). Further, Plaintiffs have failed to present any argument or analysis that the stated purposes of Ordinance No. 680 are not legitimate governmental objectives. Accordingly, the Court CONCLUDES that the seven stated purposes of Ordinance No. 680 are legitimate governmental interests.

10. There is no dispute between the parties that the availability of affordable housing is also a legitimate governmental interest.

Substantial Advancement

11. Ordinance No. 680 substantially advances a legitimate government interest if it bears a "reasonable relationship to the objective." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 701,704, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (approving jury instruction as "consistent with our previous general discussions of regulatory takings liability."); *see also Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1041 (9th Cir. 2000). A reasonable relationship in the context of a Takings Clause analysis is not equivalent to the rational basis test. *Nollan*, 483 U.S. at 834 n.3; *Herrington v. Sonoma Cty.*, 834 F.2d 1488, 1489 n.7 (9th Cir. 1987). However, "[a] reasonable relationship does not depend on the State's action being roughly proportional to its asserted interests." *Chevron*, 224 F.3d at 1041; *see also Del Monte Dunes*, 526 U.S. at 702-703. Rather, in order for Ordinance No. 680 to substantially advance a legitimate governmental interest, there must be a sufficient connection or "nexus" between the operative rent and vacancy control provisions and the legitimate governmental interests addressed above. *Chevron*, 224 F.3d at 1040; *Yee*, 503 U.S. at 530 (citing *Nollan*, 483 U.S. at 834-35.)

12. Because Plaintiffs proceed upon the theory that the rent control ordinance creates a premium which benefits the mobilehome park residents, they must prove by a preponderance of the evidence that Ordinance 680 will or is likely to create a premium. *Chevron*, 224 F.3d at 1039-41.

> 13. "Factual" issues that involve predictive fact almost always require a court to survey the available evidence, to credit certain pieces of evidence above others, and to draw cumulative inferences until it reaches a judgmental conclusion. In the end, the court makes its best assessment about what is most likely to happen in the future. In such an inquiry, the ultimate "facts" in dispute are most successfully approached when all relevant evidentiary underpinnings are fully developed.

Chevron, 224 F.3d at 1039.

14. Further, plaintiffs must prove by a preponderance of the evidence that the premium will "vitiate" the "cause-and-effect relationship" between the operative rent and vacancy control provisions of Ordinance No. 680 and the legitimate governmental interests which Ordinance No. 680 is intended to further. *Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997); *Chevron*, 224 F.3d at 1040-41.[4]

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[4] Plaintiffs appear to argue that the creation of a premium itself is sufficient to establish a regulatory taking because the premium constitutes a transfer of wealth from the mobilehome park owner to the mobilehome coach owner, citing *Richardson*, 124 F.3d 1150. The Ninth Circuit implicitly rejected this

(continued...)

15. Given the Court's findings of fact and legal standard discussed, the Court CONCLUDES that Plaintiffs have failed to prove by a preponderance of the evidence that Ordinance No. 680 is likely to create a premium.

16. Given the Court's findings of fact and legal standard discussed, the Court FURTHER CONCLUDES that Plaintiffs have further failed to prove by a preponderance of the evidence that, even if a premium did exist, it would vitiate the nexus between the rent and vacancy control provisions and the realization of the intended governmental objectives addressed above.

17. Accordingly, the Court concludes that Plaintiffs have failed to establish that Ordinance No. 680 fails to substantially advance legitimate governmental interests.

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[4] (...continued)
analysis in *Richardson*. The district court in *Richardson* found an unconstitutional taking because there was a transfer of wealth as a result of the premium—the same argument Plaintiffs now advance. However, the Ninth Circuit held that while it agreed that there was an unconstitutional regulatory taking, "we do so for somewhat different reasons than the district court." *Id.* at 1165. The court acknowledged that "[l]and use regulations do influence the value of property"—i.e., there will always be some transfer of wealth. *See id.* However, "to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest." *Id.* Thus, in *Richardson*, because the rent control created a premium equal to the value of below market rent, this effectively thwarted the purpose of the statute which was to create affordable housing. *See id.* at 1165-66. On this basis the ordinance constituted an unconstitutional taking. *See id.* Thus, it is the negative impact of the transfer of wealth on the legitimate governmental interest, not its mere existence, which implicates the Fifth Amendment.

Statute of Limitations

18. Defendant asserts that the statute of limitations bars Plaintiffs' facial challenge. State law governs the length of the limitations period in section 1983 actions. *See Silva v. Crain*, 169 F.3d 608, 610 (9th Cir. 1999) (citing *Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938 (1985)). However federal law determines when the action accrues. *See Elliot v. City of Union City*, 25 F.3d 800, 801-802 (9th Cir. 1984).

19. The statute of limitations for section 1983 actions in California is one year. *See McDougal v. County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991).

20. "Generally, the statute of limitations begins to run when a potential plaintiff knows or has reason to know of the asserted injury." *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991). In the context of a facial challenge, the one-year statute of limitations begins to run when the statute is enacted and thus the plaintiff knows or has reason to know that a regulatory taking is likely to occur. *Yee*, 503 U.S. at 533-34; *Levald*, 998 F.2d at 688-89. Under this analysis, the statute of limitations for a facial challenge to Ordinance No. 680 began to run on September 23, 1998, when the statute was enacted.

21. However, where a challenged rent control ordinance contains the same provisions as a previous ordinance, the conduct of the government in relation to the prior and challenged ordinances has remained exactly the same, and the effect of the ordinances upon the plaintiffs has not been altered such that they have suffered substantially the same unconstitutional taking under the prior and challenged ordinances, the court will consider the statute of limitations to have run when the previous rent control ordinance was enacted. *De Anza*, 936 F.2d at 1086.

22. Because Cotati consistently applied the 1979 Ordinance as containing rent and vacancy control provisions equivalent to those provided in Ordinance No. 680—including a decision by the Cotati Rent Appeals Board against Plaintiff Gene Cashman which construed the 1979 Ordinance as providing vacancy control—and because Plaintiffs' expert Dr. St. John testified that the effect of the 1979 Ordinance was the same as the effect of Ordinance No. 680 and that Ordinance No. 680 "piggy backs" on the 1979 Ordinance, the Court finds that Plaintiffs were aware or should have been aware of the alleged regulatory taking under the 1979 Ordinance, which continued, unaltered, with the enactment of Ordinance No. 680. Accordingly, the Court finds that the statute of limitations for Plaintiffs' facial challenge began in 1979 with the enactment of the previous rent control ordinance. Accordingly, the statute of limitations bars Plaintiffs' claim under the Fifth Amendment. *See De Anza*, 936 F.2d at 1086 (amendment to rent control ordinance did not reset statute of limitations because previous ordinance had same effect as amended ordinance and injury to plaintiffs was substantially the same); *see also County of Santa Cruz Mobilehome Parkowners Ass'n v. County of Santa Cruz*, 2001 WL 1220741, at *2-3, C 00-20631-JF (N.D. Cal. Sept. 28,2001) (finding that where new rent control ordinance contained same .material provisions as predecessor rent control ordinance, statute of limitations ran upon enactment of predecessor rent control ordinance).

IV. Conclusion

Based upon the above findings of fact and conclusions of law,

THE COURT HEREBY CONCLUDES THAT Defendant City of Cotati Ordinance No. 680, Chapter 19.14 of the Cotati Municipal Code, does not violate the Fifth and Fourteenth Amendments of the United States Constitution because it does not constitute a facial regulatory taking.

THE COURT FURTHER CONCLUDES THAT Plaintiffs' facial challenge to Ordinance No. 680, Chapter 19.14 of the Cotati Municipal Code, is barred by the statute of limitations.

IT IS SO ORDERED.

Dated: Sept. 4, 2002

/s/ Saundra B. Armstrong
SAUNDRA B. ARMSTRONG
United States District Judge

Appendix E-1

FILED August 25, 2005
Cathy A. Catterson, Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENE CASHMAN; ATHENA SUTSOS, *Plaintiffs-Appellants,* v. CITY OF COTATI, a municipal corporation, *Defendant-Appellee.*	No. 03-15066 D.C. No. CV-99-03641-SBA/RS Northern District of California, Oakland ORDER

Before: Arthur L. Alarcon, Robert R. Beezer, and William A. Fletcher, Circuit Judges.

The panel has voted to deny the petition for panel rehearing, and Judge Fletcher has voted to deny the petition for rehearing en banc. Judges Alarcon and Beezer recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENE CASHMAN; ATHENA SUTSOS, *Plaintiffs-Appellants,* v. CITY OF COTATI, a municipal corporation, *Defendant-Appellee.*	No. 03-15066 D.C. No. CV-99-03641-SBA/RS OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
February 11, 2004—San Francisco, California

Filed July 15, 2004

Before: Arthur L. Alarcon, Robert R. Beezer,
and William A. Fletcher, Circuit Judges.

Opinion by Judge Beezer;
Dissent by Judge W. Fletcher

COUNSEL

R.S. Radford, Meriem L. Hubbard, and Harold E. Johnson, Pacific Legal Foundation, Sacramento, California, for the appellants.

Donald R. Lincoln and Henry E. Heater, Endeman, Lincoln, Turek & Heater LLP, San Diego, California, and Jeffrey A. Walter, Walter & Pistole, Sonoma, California, for the appellee.

OPINION

BEEZER, Circuit Judge:

Appellants Gene Cashman and Athena Sutsos, both mobilehome park owners, allege that the rent control ordinance adopted by appellee City of Cotati, California ("the City") effects a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. After granting their motion for summary judgment and entering judgment, the district court amended then vacated that judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), respectively. The district court conducted a trial and entered judgment for the City. Cashman and Sutsos appeal the district court's orders amending and vacating the original judgment, as well as its findings and conclusions following trial.

We vacate the post-trial judgment and remand to the district court for reinstatement of the original judgment in favor of Cashman and Sutsos.

I

On September 23, 1998, the City adopted Ordinance No. 680, entitled the Mobilehome Park Space Rent Stabilization Program ("Ordinance No. 680" or "the Ordinance"). The City adopted Ordinance No. 680 in anticipation of the repeal of its then-governing rent control ordinance, Chapter 19.12, adopted in 1979 ("the 1979 Ordinance").[1] The operative provisions of Ordinance No. 680 limit the annual rental increases mobilehome park owners can charge to the lesser of 6% or the percentage change in the Consumer Price Index (CPI). Proposed increases exceeding this amount are subject to administrative review. Unlike the 1979 Ordinance, Ordinance No. 680 contains an explicit provision regarding vacancy control.[2] Vacancy control prevents

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[1] The 1979 Ordinance covered all types of rental properties. Pursuant to a settlement agreement in an unrelated case, the City was required to place the question of repealing the 1979 Ordinance on the ballot for November 1998. The voters approved the repeal; Ordinance No. 680 took effect on December 19, 1998.

[2] Section 19.14.150 of the Ordinance, titled "VACANCY CONTROL AND DE-CONTROL—ESTABLISHMENT OF NEW BASE RENT," provides, in part, that:

> (a) Except as otherwise provided in this Sec. 19.14.150, a mobile home park owner shall not charge a new base rent or increase the rent for a mobile home space because that space has become vacant or the tenancy with respect to that space has terminated. A mobilehome park owner shall be permitted to charge a new base rent for a mobilehome space whenever a lawful space vacancy occurs. For the purposes of this chapter, a lawful space vacancy is defined as follows:
>
> > (1) A vacancy of the mobilehome space occurring because of the termination of the

(continued...)

mobilehome park owners from charging a new base rent or increasing the existing rent for a mobilehome space when ownership of a mobilehome coach is transferred and the coach remains in place.

The stated purpose of Ordinance No. 680 is to "stabilize the rate of mobilehome park rental rates." According to the Ordinance, the stabilization of rental rates will accomplish the following:

(1) prevent exploitation of the shortage of vacant mobilehome park spaces;

(2) prevent excessive and unreasonable mobilehome park space rent increases;

(3) rectify the disparity of bargaining power which exists between mobilehome park residents and mobilehome park owners;

(4) provide mobilehome park owners with a guaranteed rate of annual space rent increase

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[2] (...continued)

tenancy of the affected mobilehome tenant in accordance with the Mobilehome Residency Law . . . ;

(2) A vacancy of the mobilehome space arising from the voluntary removal of a mobilehome from the mobile home space by the affected mobilehome tenant . . . .

. . .

(c) In the absence of a lawful vacancy of the mobilehome space, a park owner is prohibited from raising rent upon a sale of a mobilehome on site to a tenant-to-be or a current tenant.

which accurately reflects the rate of inflation and increases in their expenses; and

(5) provide a process for ensuring mobilehome park owners a fair, just and reasonable rate of return on their parks in cases where the guaranteed annual space rent increase provided by this chapter proves insufficient;

(6) provide continued rent control through the transfer of a mobilehome-on-site (i.e., on the mobilehome pad) to a new mobilehome owner to prevent exploitative rental increases which take place when vacancy decontrol is either in effect or practised by park owners.

(7) provide options in the duration of tenancies to prospective mobilehome tenants to prevent oppressive adhesion contracts from being imposed upon new park tenants.

The district court concluded that Ordinance No. 680 has the additional purpose of providing and maintaining affordable housing to lower income and elderly residents.

Ordinance No. 680 also contains several legislative findings of fact in support of its adoption. These findings describe the mobilehome market in Cotati, including the 0% vacancy rate among mobilehome park spaces; the older and lower income demographic common among mobilehome owners; the high costs associated with relocating a mobilehome; and the success of the 1979 rent stabilization ordinance. There is also a finding that "[s]ince the adoption of the 1979 rent stabilization ordinance, the City has construed its provisions as requiring vacancy control: that is, upon the tenant's vacating of a rental unit or space, his/her successor

tenant is entitled to the same rent previously charged to the vacating tenant."

Cashman and Sutsos own mobilehome parks in Cotati that are subject to Ordinance No. 680. They bring the instant action alleging, *inter alia*, that Ordinance No. 680 constitutes a facially unconstitutional regulatory taking because it does not substantially advance the City's interests as they are described in the Ordinance. Specifically, Cashman and Sutsos claim that Ordinance No. 680 permits a tenant to capture a premium upon the sale of his/her mobilehome coach that corresponds to the increased value of the coach attributable to rent control. This premium, they argue, keeps the costs for incoming tenants the same and, therefore, prevents the Ordinance from substantially advancing the City's interests, including increasing affordable housing. They seek injunctive and declaratory relief.[3]

The district court initially granted Cashman's and Sutsos's motion for summary judgment. Relying largely on our decision in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir.1997), the court declares "the Ordinance to be an unconstitutional regulatory taking in violation of the Takings Clause of the Fifth Amendment," and enters judgment. The district court subsequently grants the City's motion to amend the judgment pursuant to Rule 59(c), holding that only the Ordinance's vacancy control provision is unconstitutional, not the entire Ordinance.

The City appealed the grant of summary judgment; Cashman and Sutsos cross-appealed regarding the district court's decision to amend the judgment.

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[3] The district court granted the City's motion to dismiss Cashman's and Sutsos's additional claims for damages.

While these appeals were pending we filed an opinion in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000) ("*Chevron I*"). In response to the City's Rule 60(b) motion, the district court requested that we remand the case so that it could consider whether its earlier interpretation of Richardson was erroneous in light of Chevron I and whether to grant relief from the amended judgment.[4] We remanded the case to the district court, which, in turn, vacated its amended judgment and proceeded to trial. Cashman and Sutsos appealed. We dismissed their appeal. We also dismissed the other pending appeals as moot.

The district court conducted a five-day bench trial[5] in the course of which it heard testimony from both parties's expert witnesses. The trial court concludes that Cashman and Sutsos failed to show that Ordinance No. 680 creates or is likely to create a premium in connection with the resale of mobilehome coaches and that even if a premium did exist, Cashman and Sutsos did not establish that it would interfere with the stated purposes of the Ordinance.

II

In its findings of fact and conclusions of law following trial, the district court concludes that Cashman's and Sutsos's

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[4] The City filed its notice of appeal prior to its Rule 60(b) motion because we had not yet issued our opinion in *Chevron I*. To make a Rule 60(b) motion after a notice of appeal has been filed, "the proper procedure is to ask the district court to indicate whether it wishes to entertain the motion, or to grant it, and then move, if appropriate for remand of the case." *Long v. Bureau of Econ. Analysis*, 646 F.2d 1310, 1318 (9th Cir. 1981), *rev'd on other grounds*, 454 U.S. 934, 102 S. Ct. 468, 70 L.Ed.2d 242 (1981).

[5] Prior to trial, Judge William H. Orrick recused himself; Judge Saundra Brown Armstrong presided.

claims are barred by the statute of limitations. The district court says that because Ordinance No. 680 has the "same effect and operative provisions" as the 1979 Ordinance, Cashman and Sutsos were on notice of the alleged regulatory taking under the 1979 Ordinance; therefore, the statute for their facial challenge began to run with the passage of the 1979 Ordinance. *Id.*

We review *de novo* the question whether a claim is barred by the statute of limitations. *Immigration Assistance Project of Los Angeles County Federation of Labor (AFL-CIO) v. INS*, 306 F.3d 842, 856 (9th Cir. 2002). We also review *de novo* the question when the statute of limitations begins to run. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 780 (9th Cir. 2002).

Cashman and Sutsos properly bring their regulatory takings claim under § 1983. *Hacienda Valley Mobile Estates v. City of Morgan*, 353 F.3d 651, 655 (9th Cir. 2003). For § 1983 actions accruing after 1985, the applicable statute of limitations is one year. *Id.* (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)). Facial regulatory takings claims accrue on either: (1) the date compensation is denied in state courts; or (2) the date the ordinance is passed, if resort to state courts is futile. *Id.* The first date is not relevant here because Cashman and Sutsos did not seek compensation from the state.[6]

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[6] Ordinarily, where a state provides adequate procedure for seeking just compensation, a facial regulatory takings claim under the Fifth Amendment will not be deemed ripe until the property owner has followed the procedure and been denied just compensation. *Hacienda Valley*, 353 F.3d at 655; *Richardson*, 124 F.3d at 1165 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985)).

However, we hold that the denial of compensation is irrelevant for ripeness purposes where a takings claim is based on the theory that the ordinance does not substantially advance a legitimate state interest. *Richardson*, 124 F.3d at 1165; *see also Yee v. City of*

(continued...)

The district court cites *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991), for the proposition that where a challenged rent control ordinance contains the same provisions as a previous ordinance, the statute of limitations will run from the date the previous ordinance was enacted, so long as the conduct of the government in relation to both ordinances and the effect on the plaintiff has not changed. Applying this proposition to the instant case, the district court concludes that the statute of limitations began to run when the 1979 Ordinance was enacted. The 1979 Ordinance "contained rent and vacancy control provisions equivalent to those provided in Ordinance No. 680" and the "[p]laintiffs' expert . . . testified that the effect of the 1979 Ordinance was the same as the effect of Ordinance No. 680."

De Anza is factually inapposite with this case. In *De Anza*, the plaintiffs challenge a rent control ordinance enacted in 1982, five years before they file suit. 936 F.2d at 1085. They argue that their claim accrues in 1987 when the county amends the ordinance to remove a sunset provision. *Id.* at 1086. We reject plaintiffs's argument, noting that "the provision of the ordinance which [plaintiffs] challenge has remained exactly the same since 1982." *Id.*

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[6] (...continued)
Escondido, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992) ("As this [premium argument] does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners's facial challenge is ripe."); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) (stating that a facial takings claim based on a substantially advanced theory is ripe the instant the challenged ordinance is passed).

Unlike the amended ordinance in *De Anza*, Ordinance No. 680 is a separate, new enactment. For example, the 1979 Ordinance applied to all types of rental properties while Ordinance No. 680 applies only to mobilehomes. The terms of Ordinance No. 680 differ substantively from the City's 1979 rent control ordinance, as well. The 1979 Ordinance established a temporary freeze and rent rollback after which maximum base rents are established annually by a rent appeals board. Ordinance No. 680, by contrast, provides specific limits on yearly rental increases—namely, the lesser of 6% or the increase in the CPI. Moreover, unlike the 1979 Ordinance, Ordinance No. 680 contains an express vacancy provision. Despite the district court's finding that the 1979 Ordinance had "the effect" of vacancy control because Cotati interpreted and enforced the ordinance as though it contained such a provision, nothing in the legislative purpose of the 1979 Ordinance or its provisions indicate that the City sought specifically to provide for vacancy control. Whatever the particular application of the earlier ordinance, it does not change the fact that Ordinance No. 680 is a provisionally-distinct enactment.[7]

Finally, the district court's reliance on the testimony of Cashman's and Sutsos's expert, Dr. Michael St. John, is misplaced. The district court quotes from Dr. St. John's testimony that "the effect of the 1979 Ordinance was the same as the effect of Ordinance No. 680 and that Ordinance No. 680 'piggy backs' on the 1979 Ordinance." However, as the following colloquy indicates, taken in context it is clear that Dr. St. John testifies only on the similar tendency of the two

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[7] Even assuming the 1979 Ordinance contained an implied vacancy control provision, the earliest Cashman and Sutsos were on notice of it was August, 8, 1998, when the City argued the point for the first time in support of a tenant's complaint in an unrelated case. Cashman and Sutsos filed this action on July 28, 1999, less than one year later.

ordinances to increase the bargaining power of mobilehome coach owners vis-a-vis park owners:

> Q: WELL, ASSUMING THE CITY ENACTED [Ordinance No. 680] TO RECTIFY THE DISPARITY BARGAINING POSITION THEY FELT EXISTED . . . , YOU WOULD AGREE THAT THE ORDINANCE HAS ACHIEVED THAT PURPOSE?
>
> A: THIS ORDINANCE PIGGY BACKS ON THE OLD ORDINANCE. THIS ORDINANCE DOESN'T DO THAT. IT'S ALREADY BEEN THAT WAY. IT'S BEEN THAT WAY SINCE '79.
>
> Q: ALL RIGHT. THE ORIGINAL ORDINANCE DID THAT?
>
> A: THE ORIGINAL ORDINANCE INCREASED THE BARGAINING POWER OF THE RESIDENTS . . . ."

Dr. St. John expresses no opinion as to the operative provisions of the two ordinances, including vacancy control, or the manner in which they regulate rents.

We reverse the district court's judgment that the statute of limitations bars Cashman's and Sutsos's claim.

III

A. We have appellate jurisdiction over the district court's orders vacating and amending the original judgment

The district court granted the City's motion to amend the judgment pursuant to Rule 59(e), finding only the vacancy

control provision of Ordinance No. 680 unconstitutional. On remand, the district court granted the City's motion pursuant to Rule 60(b), vacating the amended judgment and setting the case for trial. The City argues that both orders are interlocutory and nonappealable.

We hold that interlocutory orders that are otherwise nonappealable become merged into the final judgment. *American Ironworks & Erectors, Inc. v. North Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001). "[A]n appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment." *Munoz v. Small Bus. Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981). The district court's orders vacating and amending the judgment became appealable when it entered final judgment.[8] We have jurisdiction to review whether the district court erred in reopening the first judgment. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258-59, 36 S. Ct. 269, 60 L.Ed. 629 (1916); *see also Edwin Raphael Co. v. Maharam Fabrics Corp.*, 283 F.2d 310, 310 (7th Cir. 1960) ("[A]n order vacating a default judgment is interlocutory in character. However, it may be reviewed in an appeal from a final judgment in the same case, since it is merged in the final judgment."); 11 James Wm. Moore, et al., Moore's Federal Practice ¶ 60.30 (2d ed. 1995).

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[8] Although the City attempts to characterize the district court's order vacating the judgment as a denial of summary judgment, an order granting a motion under Rule 60(b) is distinct from the denial of summary judgment. *Ballard v. Baldridge*, 209 F.3d 1160, 1161 (9th Cir. 2000). Indeed, "[w]hen an order granting a Rule 60(b) motion [ ] merely vacates the judgment and leaves the case pending for further determination[,] the order is akin to an order granting a new trial." *Id.* (quoting *Parks v. Collins*, 761 F.2d 1101, 1103-04 (5th Cir. 1985)) (internal quotations omitted).

B. The district court abused its discretion in amending the judgment

As noted, the district court amended the judgment to find unconstitutional only the vacancy control provisions of Ordinance No. 680. In so doing, the district court finds that the "specific allegations of the complaint . . . focus on the vacancy control portion of the Ordinance" and "the possibility that tenants could sell their mobilehomes at a premium." The court then concludes that invalidating the vacancy control provision would eliminate the Ordinance's constitutional infirmities: "[A] premium could exist only because the vacancy control provision of the Ordinance prevents the mobilehome park owners from raising rents when a tenant sells his or her mobilehome to a new owner without moving it to a new location." Cashman and Sutsos argue that their complaint is not so limited; they also dispute the court's finding regarding vacancy control and premiums, claiming that the district court ignores the possibility that a new tenant would pay a premium to live in a mobilehome park where future rent increases are controlled, even if that new tenant initially is required to pay a rent higher than did the incumbent tenant.

We review the district court's decision on the City's Rule 59(e) motion to amend the judgment for abuse of discretion.[9] *Zimmerman v. City of Oakland*, 255 F.3d 734, 737

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[9] This court has not addressed the appropriate standard of review for a district court's decision granting a Rule 59(e) motion to amend, which is based, at least in part, on a question of law. Our sister circuits hold that such a motion is reviewed *de novo*, not for an abuse of discretion. *See, e.g., Pioneer Natural Resources USA, Inc. v. Paper, Allied*, 328 F.3d 818, 820 (5th Cir. 2003); *Hansmann v. Fidelity Inv. Inst. Serv.*, 326 F.3d 760, 766-67 (6th Cir.2003); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 318-319 (1st Cir. 2001). We need not resolve this question because we hold that the district court's

(continued...)

(9th Cir. 2001). An erroneous view of the facts or the law constitutes an abuse of discretion. *K.V. Mart Co. v. United Food and Commercial Workers Int'l Union, Local 324*, 173 F.3d 1221, 1223 (9th Cir.1999).

The complaint's first cause of action for declaratory relief states that "[p]laintiffs desire a judicial determination that Ordinance No. 680 effects an unconstitutional taking, and is thus void, unenforceable, and invalid." Cashman and Sutsos allege, *inter alia*, that:

> 27. Mobilehome coaches protected by [the Ordinance] and the Residency Law realize a substantial increase in price relative to comparable coaches located in parks not subject to [the Ordinance]. The increase represents the value of the right to occupy a space indefinitely at below-market rents.
>
> 28. When a resident of one of Plaintiffs' mobilehome parks sells his or her mobilehome coach, a premium is received from the purchaser corresponding to the coach's increased value attributable to the effect of [the Ordinance].

The complaint's allegations regarding the constitutionality of Ordinance No. 680 do not hinge on the existence of vacancy control or any other particular provision. It is true that absent vacancy control a mobilehome park owner can increase the amount of rent charged to a new tenant. However, consistent with Cashman's and Sutsos's allegations, an incumbent tenant selling his/her mobilehome can nonetheless extract a premium

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[9] (...continued)
decision that the vacancy control provision is severable from the remainder of Ordinance No. 680 is erroneous under either standard.

above and beyond any such rental increase based on the security of living in a mobilehome park where future rental increases are limited by the government.[10]

We conclude that the district court's order amending the judgment is based on an erroneous view of the complaint and constitutes an abuse of discretion.

C. The district court misapplied *Chevron I* when it vacated the amended judgment on remand

Cashman and Sutsos maintain that the district court erred in vacating the amended judgment pursuant to Rule 60(b).

We review the district court's decision to vacate the judgment pursuant to Rule 60(b) *de novo*. *See Fireman's Fund Inc. Co. v. Stites*, 258 F.3d 1016, 1020 (9th Cir. 2001). Although we usually review a district court's decision pursuant to Rule 60(b) for abuse of discretion, *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1254 (9th Cir. 2004), we apply our *de novo* standard in cases where, as here, "the district judge considered afresh his earlier decision to grant summary judgment."

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[10] The City responds that a mobilehome park owner can just as easily raise the rent upon the sale of a mobilehome to a higher than market level, permitting him to extract this premium based on the lack of future rent increases. Red Br. 29. The City overlooks a crucial aspect of rent control in the mobilehome park context—i.e., separate ownership of the land and the mobilehome, with the tenant having the ability to convey ownership of the mobilehome. These circumstances make it possible for both the tenant and park owner to capture part of the premium. The tenant will capture part of the premium through an increased mobilehome sale price; the park owner through increased land rent. Cashman's and Sutsos's complaint claims that the ability of the tenant to capitalize any of the value of the reduced rent effects a regulatory taking.

Fireman's Fund Inc. Co., 258 F.3d at 1020 (*citing Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (*en banc*)).[11]

A rent control ordinance effects an unconstitutional taking if it fails to substantially advance a legitimate state interest. *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980); *Chevron v. Lingle*, 363 F.3d 846, 2004 WL 720175 (9th Cir. April 1, 2004) (*Chevron II*). Unlike ordinary rent control ordinances, an ordinance that permits incumbent tenants to capture a premium based on the present value of the reduced rent fails to substantially advance a state's interest in creating or maintaining affordable housing. *Chevron II*, 2004 WL 720175, at * 7; *Richardson*, 124 F.3d at 1166; *cf. Chevron I*, 224 F.3d at 1040 ("[T]he absence of a mechanism that prevents a premium transfer [does not] *necessarily* destroy[ ] the constitutionally-required connection" where other factors may make a premium unavailable) (emphasis added); *see also Yee v. City of Escondido*, 503 U.S. 519, 530, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992) (the existence of a premium "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance").

In its original opinion granting summary judgment for Cashman and Sutsos, the district court relies on *Richardson v. City & County of Honolulu* to hold that Ordinance No. 680 is unconstitutional, as a matter of law, because "[n]othing in the language of the Ordinance prevents a mobilehome owner from capitalizing on his below-market rents by selling his

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[11] In this case, little turns on the standard of review we apply. The district court's Rule 60(b) analysis turned on legal questions and, by definition, an erroneous view of the law is an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990).

mobilehome for a premium." This, the court states, prevents Ordinance No. 680 from substantially furthering the City's interest in maintaining affordable rent, lessening inequality of bargaining power and permitting landlords a reasonable rate of return.

The district court subsequently granted the City's motion for a memorandum opinion stating the court's inclination to grant relief from the amended judgment in light of our opinion in *Chevron I*. According to the court, *Chevron I* makes clear that Cashman and Sutsos failed to meet their burden for summary judgment because they "did not present any evidence as to the likelihood that [Ordinance No. 680] would create a sales premium that could be captured by the mobilehome park tenants," as a matter of fact, or that "any such sales premium would interfere with the purposes of the Ordinance."

The district court's original opinion correctly applies the law; the court misinterprets our opinion in *Chevron I*.

1. *A rent control ordinance that does not on its face provide for a mechanism to prevent the capture of a premium is unconstitutional, as a matter of law, absent sufficient evidence of externalities rendering a premium unavailable*

In *Richardson v. City and County of Honolulu*, land owners facially challenge Hawaii's rent control ordinance that limits increases in ground rent due to the owners of the land under condominium units. 802 F. Supp. 326, 329-30 (D.Haw. 1992). The legislature passed the ordinance to combat excessive increases in lease rates, inequity of bargaining power, and the deleterious effect of increasing lease rentals on existing tenants. *Id.* at 329. Like mobilehome parks, condominiums ordinarily involve dual ownership—that is, the land underneath the condominium is owned by someone other than the condominium owner. *Id.* at 339. The rent control ordinance in

Richardson allows owner-occupants to sell their condominiums subject to the controlled ground rents so long as the new tenant also intends to be an owner-occupant. *Id.* at 330. The landowners argue that the ordinance does not substantially further Hawaii's interests because it allows owner-occupants to capture a premium on the sale of their condominium, thereby failing to reduce the costs to new owners. *Id.* at 338. The district court agrees. Faced with no conflicting expert evidence, the court relies on the "principles relating to premiums," concluding that where, as in the context of condominiums, there is separate ownership of the land and housing unit involved, government-controlled rent and transferability of the right to future controlled rent, incumbent owners will be able to command a premium upon the sale of their housing unit. 802 F. Supp. at 339. The district court holds that summary judgment is appropriate because this possibility of a premium prevented Hawaii's rent control ordinance from substantially advancing its purpose. *Id.* We affirm, holding that "[t]he absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing." *Id.* at 1166; *see also id.* at 1164-65.

In *Chevron I*, in an effort to reduce retail gasoline prices, Hawaii enacts an ordinance capping the rent gasoline companies can charge lessee-dealers of retail service stations. 57 F. Supp. 2d 1003, 1004-04 (D. Haw. 1998). The reduced rent is intended to protect the continued viability of independent lessee-dealer stations, leading to a less concentrated market and, in turn, lower retail prices. *Id.* at 1010. Chevron, an oil company, alleges that the ordinance effects a regulatory taking because it does not substantially advance Hawaii's interest in lowering retail gasoline prices. Chevron's expert argues that this is the case for the following reasons: (1) the rent cap will actually discourage independent lessee-dealers, increasing

concentration and raising retail prices; (2) any benefit to lessee-dealers will not result in lower retail prices because existing lessee-dealers can capture the value of the reduced rent in the form of a premium on the sale of their leaseholds; and (3) oil companies may increase wholesale prices to make up for the loss in rental income, thereby removing the possibility of a premium capture by lessee-dealers and lower retail prices. Hawaii's expert disputes the analysis of Chevron's expert on all three points.

The district court grants summary judgment for Chevron, holding that, under *Richardson*, the absence of a mechanism to prevent lessee-dealers from capturing a premium automatically prevents the state from substantially furthering its interest in lower retail prices, rendering the ordinance unconstitutional. *Id.* at 1011. On appeal, we vacate the district court's judgment. *Chevron I*, 224 F.3d at 1042. As an initial matter, we state that to carry its burden of proving the rent cap does not substantially advance a legitimate state interest, Chevron has to show, by a preponderance of the evidence, that the rent cap is not reasonably related to Hawaii's objective of lowering retail prices. *Id.* at 1041. This in turn requires a finding that the cap will not in fact lead to lower prices. *Id.* ("The mere possibility that [retail prices will remain the same] does not satisfy Chevron's burden."). Unlike in *Richardson*, we reason, there are disputed issues of fact regarding the gasoline market and the parties's multi-factored relationship. *Id.* at 1040 ("[O]ur conclusion in *Richardson* [that summary judgment was appropriate] was based on the district court's findings that incumbent owners *will* charge a premium and that the price of housing *will* remain the same."). Remand is necessary to have a better understanding of the market for gasoline in general, e.g., the competitiveness of the market for lessee-dealer rights and the elasticity of demand for gasoline. *Id.* at 1040. Remand is also necessary to determine whether under the circumstances a premium will exist at all. We note that the district court

wrongly concluded that "the absence of a mechanism that prevents a premium transfer *necessarily* destroys the constitutionally-required connection." *Id.* (emphasis added). In other words, the possibility of a premium does not render an ordinance unconstitutional where other external factors may prevent a premium from existing altogether. This is the case in *Chevron I*. There is no dispute in that case that lessee-dealers will capture a premium, if available; both parties concede that all things remaining equal they will. Remand nonetheless is appropriate to establish the likelihood that oil companies will increase their wholesale prices to regain what they lost in rent and thereby eliminate the existence of any premium for lessee-dealers. Therefore, *Chevron I* holds that the conflicting expert evidence creates genuine issues of material fact regarding whether the rent cap will in fact lower retail prices. *Id.* at 1042. ("Whether, and to what extent, Chevron will raise its wholesale price of fuel to compensate for lost rent, and whether, and to what extent, incumbent dealers will capture the value of the capped rent in the form of a premium . . . remain as unanswered questions.")

2. *The district court wrongly vacated the amended judgment where the Ordinance does not on its face prevent mobilehome owners from capturing a premium and where there is not sufficient evidence of externalities preventing the possibility of a premium altogether*

In vacating the amended judgment the district court concludes that *Chevron I* requires Cashman and Sutsos to produce empirical evidence on the likelihood that the mobilehome park tenants in Cotati will be able to capture a sales premium, as a matter of fact, and that any such premium will interfere with the purposes of the Ordinance.

This conclusion is based on a misunderstanding of a statement in *Chevron I* that *Richardson* is based on "findings

that incumbent dealers *will* charge a premium and that the price of housing *will* remain the same." 224 F.3d at 1040 (emphasis in original). The district court apparently reads this to require a plaintiff—even on a premium-based facial challenge—to establish by empirical evidence that incumbent tenants in the area affected will be likely to capture a premium under the particular ordinance challenged. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000). However, the district court in *Richardson* does not require, nor is it faced with, such evidence. To the contrary, as noted above, *Richardson* relies only on the economic "principles of premiums" and finds that the rent control ordinance, in conjunction with dual ownership and transferability of ownership, will "*allow*" and "*enable* [ ] an owner-occupant to charge a premium." 802 F. Supp. at 339 (emphasis added). Under the circumstances, more definite proof is not required. *Cf. Chevron I*, 224 F.3d at 1040 (remand appropriate to determine likelihood that oil companies will adjust pricing to offset benefits of rent control law and prevent the existence of premium for dealers).

In this case, the district court erred in requiring Cashman and Sutsos to submit the type of empirical evidence discussed above to meet their burden on summary judgment. Like in *Richardson*, there is no dispute that Ordinance No. 680 does not on its face prevent mobilehome tenants from capturing a premium. There is separate ownership of the mobilehome coaches and the underlying land, controlled rent, and the ability of incumbent tenants to sell their mobilehomes subject to this controlled rent. This creates the possibility of a premium, which undermines the City's interest in creating or maintaining affordable housing. *Richardson*, 124 F.3d at 1166. Accordingly, Cashman and Sutsos are entitled to summary judgment on their facial claim unless the City presents sufficient evidence of external factors that will prevent the existence of a premium altogether.

The only evidence the City submitted is a 1990 report prepared for the City by an expert who stated that mobilehome owners in Sonoma County (which includes Cotati) are so distrustful of rent control that they will pay less for a mobilehome than for one that is not under rent control. The original district court opinion correctly finds that such evidence is insufficient to create a genuine issue of material fact on a facial takings claim under *Richardson* and *Chevron I*. On a facial takings claim, a court is to look only to the ordinance's general scope and dominant features, not its application in specific circumstances. *Tahoe-Sierra Pres. Council, Inc.*, 216 F.3d at 774. Unlike the disputes in *Chevron I*, which are over the operation of the gasoline market generally and whether oil companies will prevent a premium from existing altogether, the mistrust of some would-be mobilehome purchasers in Sonoma County does not pertain to the "dominant" impact of the Ordinance.

We conclude that the district court's order vacating the amended judgment is based on an erroneous interpretation of *Chevron I*. Ordinance No. 680 does not prevent incumbent tenants from capturing a premium. The Ordinance does not substantially further the City's interests, including that of maintaining affordable housing. We remand to the district court to reinstate the original judgment.

REVERSED AND REMANDED.

W. FLETCHER, Circuit Judge, dissenting:

In this case we return, unhappily, to rent control. I respectfully but emphatically dissent.

We took a wrong turn in *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1164 (9th Cir. 1997), where we held

that when a tenant actually captures a premium resulting from a rent control statute, the statute is an unconstitutional regulatory taking unless it "substantially furthers a legitimate state interest." We continued on the wrong path in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000) (*Chevron I*), where we concluded that when a tenant may *possibly* capture a premium, the "substantially furthers" test must be satisfied and remanded for trial. *Id.* at 1040, 1042 (now stating the test as whether the statute "substantially *advances* a legitimate state interest") (emphasis added). We persisted on that wrong path in *Chevron USA, Inc. v. Lingle*, 363 F.3d 846 (9th Cir. 2003) (*Chevron II*), where we affirmed the judgment of the district court, concluding that its factual finding that the rent control statute did not satisfy the "substantially advances" test was not clearly erroneous. 363 F.3d at 857. We now desert the wrong path taken in *Richardson*, *Chevron I*, and *Chevron II*, only to take yet another wrong path.

I disagreed with the panel in both *Chevron* cases. *See Chevron I*, 224 F.3d at 1042 (W. Fletcher, J., concurring in the judgment); *Chevron II*, 363 F.3d at 858 (W. Fletcher, J., dissenting). But if the majority in today's case were faithful to those cases, I would concur because they are (or were) the law of the circuit.

However, the majority today refuses to apply the *Chevron* cases. Under those cases, the possibility of a premium capture triggered the application of the "substantially advances" test. But under today's holding, what was the trigger for the "substantially advances" test has itself become the test. Under today's holding, if there is a possibility that tenants will capture a premium, or even part of a premium, that possibility in and of itself renders a rent control ordinance unconstitutional.

I. Procedural Background

The City of Cotati, located in Sonoma County, California, north of San Francisco Bay, has controlled rents in mobile home parks since 1979. In 1998, Cotati adopted Ordinance 680, amending the previous rent control ordinance but continuing the same general scheme. Plaintiffs-Appellants Cashman and Sutsos ("plaintiffs") own mobile home parks in Cotati. In 1999, they brought a facial challenge to Ordinance 680, contending that it effects a regulatory taking in violation of the Due Process Clause of the Fourteenth Amendment.

In 2000, based on its reading of *Richardson*, the district court granted summary judgment to plaintiffs. It held that in the absence of a mechanism in Ordinance 680 preventing mobile home park tenants from capturing a premium, the entire ordinance effected an unconstitutional taking. The district court subsequently amended its judgment under Federal Rule of Civil Procedure 59(c), holding unconstitutional only the vacancy control portion of Ordinance 680. After the entry of the district court's amended judgment, we decided *Chevron I*, in which we remanded to the district court for a determination at trial whether a rent control statute "substantially advance[d] a legitimate state interest." *Chevron I*, 224 F.3d at 1040, 1042.

After *Chevron I* was handed down, the district court vacated its summary judgment in this case. Doing as we had instructed the district court to do in *Chevron I*, the district court held a trial to determine whether Ordinance 680 satisfies the "substantially advances" test. After a five-day trial, during which evidence was presented by experts from both sides, the district court held against the plaintiffs.

First, the district court held that plaintiffs' claims were barred by the statute of limitations because the 1979 ordinance

was applied in the same manner as the later-enacted Ordinance 680. Thus, the one-year statute of limitations had begun to run in 1979. Second, the court held that if the statute of limitations had not run, plaintiffs' claims failed on the merits. It held that plaintiffs had not shown by a preponderance of the evidence that Ordinance 680 is likely to create a premium. It held, further, that even if a premium did exist, plaintiffs had not shown by a preponderance of the evidence that such a premium would prevent the ordinance from substantially advancing such legitimate state purposes as protecting tenants, including elderly and low-income people, from excessive rent increases.

On appeal, the majority first holds that the statute of limitations did not begin to run until the passage of Ordinance 680 in 1998. Although it is a close question, I do not quarrel with the majority on this point.

The majority next holds that the district court erred in amending and then vacating its summary judgment. The majority concludes that there is "the possibility of a premium" under Ordinance 680. Maj. op. at 899. In the sense used here, a "premium" is capitalized value conferred on a tenant by virtue of rent control. If rent control lowers the price of a tenancy below the open- market price for a comparable tenancy, and if an existing tenant can sublease or otherwise sell a rent-controlled tenancy, the existing tenant may be able to obtain, as part of the selling price for that tenancy, the capitalized value of the difference between the rent-controlled rent and the open-market rent. This phenomenon is known as "capturing the premium." Depending on the circumstances and the nature of the particular rent control regime, a tenant may be able to capture some, or even all, of the premium resulting from rent control.

When the majority writes that there is "the possibility of *a* premium," its use of the indefinite article "a" is important. "*The* premium" would mean the entire premium resulting from rent control. By contrast, "*a* premium," as used by the majority, means *any part of* the premium.

The majority holds that because of the possibility that mobile home owners might capture "a premium"—that is, part of the premium resulting from Ordinance 680—plaintiffs "are entitled to summary judgment on their facial claim unless the City presents sufficient evidence of external factors that will prevent the existence of a premium altogether." *Id.* at 899. In other words, the majority requires that, in order to sustain the constitutionality of Ordinance 680, defendant Cotati must prove that mobile home owners would not capture any part of a premium as a result of the ordinance. The majority concludes that there is no genuine issue of material fact as to whether mobile home owners would capture any part of such a premium, and therefore reinstates the district court's pre-*Chevron I* summary judgment that Ordinance 680 is unconstitutional.

II. Rent Control in Mobile Home Parks

Residential rentals in mobile home parks are different from ordinary residential rentals. In an ordinary residential rental, the landlord owns the apartment or house, and rents that apartment or house to the tenant. The tenant brings to the house or apartment only his or her own personal effects and, at the end of the tenancy, takes away those personal effects. If a landlord raises the rent on the apartment or house and the tenant moves out to avoid the higher rent, the tenant incurs only the expense of moving those effects to a different apartment or house.

By contrast, in a typical mobile home park rental, the landlord is the "park" owner. The park owner owns only the

land, or "pad," on which the mobile home sits. The tenant rents the pad but owns the mobile home. Despite their name, mobile homes are not, in fact, mobile. They are constructed off site, put on wheels to be transported, and towed to the site where they will be placed. The difficulty and very substantial expense of moving a mobile home once it has been placed on its pad means that it is almost never moved thereafter.

A mobile home owner—that is, a tenant in a mobile home park—is therefore in a very different economic situation from an ordinary residential tenant. Because of the almost prohibitive expense involved in moving a mobile home, a mobile home park owner has considerable freedom, absent rent control, to raise rents on all of his or her existing tenants. To state it in economic terms, if the park owner raises the rent on an existing tenant who wants to continue living in the mobile home, the tenant is likely to pay any rent increase whose capitalized cost is less than the cost of moving the mobile home. Or, if the park owner raises the rent when an existing tenant sells the mobile home to a new owner, the price paid for the mobile home will likely be reduced by the amount of the capitalized value of the rent increase. To state it in colloquial terms, absent rent control, a park owner can gouge existing tenants.

As a result, many jurisdictions in California and elsewhere have adopted rent control ordinances specifically tailored to mobile home parks. Approximately 100 jurisdictions in California have ordinances of this kind. Most such ordinances are like the ordinances Cotati has had since 1979. Cotati has consistently limited rent increases for existing tenants, and, with some exceptions, limited rent increases for purchasers who buy from existing tenants. Ordinance 680, adopted by Cotati in 1998, limits rent increases in frequency to once a year and in amount to the lesser of 6 percent or the change in the Consumer Price Index. Ord. § 19.14.004(a). Under the "vacancy control"

provision of the ordinance, when an existing tenant sells his mobile home to a new tenant, the park owner is not permitted to raise the rent. Ord. § 19.14.150(a). However, if a resident is evicted or voluntarily removes his home from the park, the landowner may establish a new base rent for the next tenant. *Id.*

III. The Majority Errs in Reinstating Plaintiffs' Summary Judgment

Assuming that our earlier decisions in *Richardson*, *Chevron I*, and *Chevron II* are correct, the majority errs in reinstating the district court's summary judgment that Ordinance 680 is an unconstitutional regulatory taking. In reinstating that judgment, the majority writes:

> The only evidence the City submitted [at summary judgment] is a 1990 report prepared for the City by an expert who stated that mobilehome owners in Sonoma County (which includes Cotati) are so distrustful of rent control that they will pay less for a mobilehome than for one that is not under rent control. The original district court opinion correctly finds that such evidence is insufficient to create a genuine issue of material fact on a facial takings claim under *Richardson* and *Chevron I*. On a facial takings claim, a court is to look only to the ordinance's general scope and dominant features, not its application in specific circumstances . . . . [T]he mistrust of some would-be mobilehome purchasers in Sonoma County does not pertain to the "dominant" impact of the Ordinance.

Id. at 899. The majority makes several mistakes.

First, the majority misdescribes the nature of a facial challenge. A successful constitutional facial challenge to an ordinance requires that a plaintiff show that the ordinance is

incapable of constitutional application under any circumstances. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987); *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003). The plaintiff has the burden of proof of unconstitutionality. *Id.* at 813. Instead of following this established law, the majority concludes that "the possibility" of capture of any part of the premium means that the defendant rather than the plaintiff has the burden of proof of the ordinance's constitutionality. According to the majority, the defendant's burden is to show that there are "external factors that will prevent the existence of a premium altogether."

Second, the majority misapplies *Chevron I*. In *Chevron I*, there was a possibility of premium capture by the tenants. We did not, because of that possibility, require the defendant to show external factors that would altogether have prevented the existence of a premium. Nor did we hold that in the absence of such a showing by the defendant the plaintiff was entitled to summary judgment. Rather, we remanded to the district court for trial to determine if the statute "substantially advanced a legitimate state interest." We wrote that "[b]ecause resolution of these factual issues [about the existence of a premium and benefits to tenants] is necessary to determine whether Act 257 substantially advances, or bears a reasonable relationship to, the State's interest in lowering gasoline prices, the district court erred in granting summary judgment." 224 F.3d at 1042. Based on *Chevron I*, the district court in this case was entirely correct to vacate its summary judgment and to hold a trial to resolve the factual issues of whether a premium was created by Ordinance 680, and whether that ordinance substantially advances a legitimate state purpose.

Third, the majority mischaracterizes the evidence before the district court on summary judgment. It states that defendant Cotati put only one "report" into evidence and that this report did not create a genuine issue of material fact. The majority is

referring to an extensive 1990 empirical study conducted by Dr. Stephen Lewis, entitled "Economic Impact of Rent Controls on Mobile Home Resale Prices in Sonoma County and Cotati." Dr. Lewis, who later testified at trial for Cotati, concluded that there was no premium as a result of mobile home rent control in Cotati. Indeed, according to Dr. Lewis's study, mobile homes subject to rent control in Cotati sold at a substantial discount rather than a premium. Dr. Lewis summarized the results of his study as follows:

> When mobile home pad rents are subject to rent controls and when these rents are below the market value, economic theory suggests that pad rent differentials will be capitalized into the resale prices of mobile homes subject to rent controls. The data examined in this study leads to the conclusion that rent controls in Sonoma County and more specifically in Cotati and Rohnert Park have not had the expected impact on mobile home resale prices. Using data from several sources and standard statistical techniques, it has been determined after controlling for other factors that mobile home parks subject to rent control have sold on average for less than those not subject to controls . . . .
>
> Mobile homes subject to rent controls are less desirable than uncontrolled ones because of uncertainties and risks associated with rent control programs . . . .
>
> *[I]t is clear that in Sonoma County mobile homes subject to rent controls do not sell at a premium but rather at a substantial discount. Claims that such premiums exist are unwarranted and without merit.*

(Emphasis added.)

Finally, the majority misstates the record in saying that the only evidence presented by Cotati at summary judgment was Dr. Lewis's study. Cotati presented in addition a study by Dr. Kenneth Baar, who also later testified at trial for Cotati. Dr. Baar studied the effect of vacancy controls in mobile home park rentals in a different community in California. Vacancy controls limit the ability of the park owner to increase pad rent when a mobile home owner sells the mobile home. Such controls have been a feature of Cotati mobile home rent control both before and after the adoption of Ordinance 680. Dr. Baar concluded that a vacancy control feature of a rent control ordinance did not create a premium—that is, it does not produce a higher resale price for mobile home owners. Dr. Baar wrote:

> From a purely theoretical perspective, the reduced rents resulting from vacancy control might be precisely offset by the increase in value of the mobilehome in the vacancy controlled space. In fact, however, the markets for the mobilehome space and the mobilehome operate in substantially different fashions, so that effects of vacancy control do not follow the foregoing theoretical model.
>
> * * *
>
> From an affordable housing point of view, it appears that in [this community], even with vacancy control, the initial costs of mobilehome ownership for prospective purchasers . . . will be *lower* than these costs in the absence of vacancy control.

(Emphasis added.)

If the majority had properly allocated the burden of proof in plaintiffs' facial attack on Ordinance 680, if it had properly

followed *Chevron I*, and if it had properly characterized the evidence put in the record by Cotati at summary judgment, it would have concluded that the district court correctly vacated the summary judgment and sent this case to trial. At summary judgment, Dr. Lewis and Dr. Baar presented competent evidence that, if believed, compelled a conclusion that no premium was, or would be, created by mobile home park rent control in Cotati. Because Cotati produced sufficient evidence to create a genuine issue of material fact, the district court was required under *Chevron I* to deny summary judgment and proceed to trial.

IV. Defendant's Judgment after Trial Should be Affirmed

In reinstating the district court's summary judgment, the panel majority implicitly concludes that the evidence at trial was not enough to justify a judgment sustaining the constitutionality of Ordinance 680. I say this because, although Cotati presented more evidence at trial than at summary judgment, that evidence was to the same effect as the Lewis and Baar studies already presented by Cotati at summary judgment. If the majority is willing to disregard the evidence of the Lewis and Baar studies, it would be equally willing to disregard the additional evidence. This additional evidence consists of four empirical studies conducted by James Brabant, a professional real estate appraiser, of actual mobile home sales in Sonoma County and adjoining Napa County. Mr. Brabant concluded from these studies that no premium was created by Ordinance 680.

Plaintiffs presented evidence at trial through Dr. Werner Hirsch, Dr. Robert Edelstein, and John Patrick Neet. However, the district court found as a matter of fact that plaintiffs' experts' studies and testimony were less believable than those of Dr. Lewis, Dr. Baar, and Mr. Brabant.

I disagree with the majority's implicit conclusion that the evidence presented by Cotati was insufficient to support the district court's judgment. I would uphold the factfinding of the district court after trial under the clearly erroneous standard, as we upheld the factfinding of the district court after trial in *Chevron II*, 363 F.3d at 857, and I would affirm the judgment of the district court.

V. A Return to Judicial Activism

We learned in the 1930s that economic regulation is generally done better by politically accountable legislators than by life-tenured judges. I regret to say that the Ninth Circuit is unlearning that painfully learned lesson.

There are two different constitutional tests that could conceivably apply to a rent control ordinance. The first is the "reasonableness" test ordinarily applied to rent and price control statutes. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 11, 108 S. Ct. 849, 99 L.Ed.2d 1 (1988) (upholding a rent control ordinance because it was not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70, 88 S. Ct. 1344, 20 L.Ed.2d 312 (1968)). The second is the "substantially advances a legitimate state interest" test ordinarily applied to zoning and other land use regulations. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980) (upholding a zoning ordinance because it "substantially advance[d] legitimate governmental goals"); *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987).

In *Richardson*, decided in 1997, we applied the "substantially advances" test to invalidate a rent control

ordinance under which we concluded that the tenant was actually able to capture the premium resulting from rent control. *See* 124 F.3d at 1166 ("Incumbent owner occupants who sell to those who intend to occupy the apartment *will charge a premium* for the benefit of living in a rent controlled condominium. The price of housing ultimately *will remain the same.*") (emphasis added). In *Chevron I*, three years later, we went beyond *Richardson*, holding that the "substantially advances" test must be applied to the rent control statute at issue because of the "possibility" of premium capture. *See* 224 F.3d at 1035 (applying the "substantially advances" test because of the "stipulated possibility that [a tenant] will be able to capture the value of the decreased rent in the form of a premium."). In *Chevron II*, just last year, we upheld as not clearly erroneous the factfinding of the district court that the "substantially advances" test had not been satisfied, and that the rent control statute was unconstitutional. *See* 363 F.3d at 857 ("Based on all the evidence adduced at trial, the district court concluded that [the rent control statute] will not substantially advance a reduction in the retail price of gasoline. The court's factual findings and conclusions of law are consistent with the views of the parties' experts and are not clearly erroneous."). Finally, today the majority holds that the mere "possibility" that a tenant could capture part of the premium from a rent control ordinance is enough to render the ordinance unconstitutional. It then reinstates a summary judgment of unconstitutionality despite evidence in the record that no premium actually resulted, or would result, from Ordinance 680.

The only possible basis for the majority's holding is dictum in *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992), in which the Supreme Court upheld a mobile home rent control ordinance against a takings challenge. The Court upheld the ordinance against a physical takings challenge, but refused to consider whether the ordinance constituted a regulatory taking. In the course of noting that it

was not considering the regulatory takings issue, the Court wrote in dictum:

> [T]he effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed . . . . Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the Escondido ordinance and that of an ordinary apartment rent control statute . . . . [P]etitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. *See Nollan v. California Coastal Comm'n*, [483 U.S. 825, 834-35 (1987)]. But it has nothing to do with whether the ordinance causes a *physical* taking.

Id. at 530, 112 S. Ct. 1522 (emphasis in original).

It is a very long way from this passage in *Yee* to the majority's holding in this case. The Court in *Yee* did not say, even in a case where there was an actual premium, that the *Nollan* "substantially advances" test would apply. Nor did the Court in *Yee* say that where there was only the possibility of a premium, the "substantially advances" test would apply. Nor, finally, did the Court in *Yee* say that the possibility of a premium alone would render a rent control ordinance unconstitutional, without regard to the "substantially advances" test.

Based on a slender hint in *Yee*, we have constructed a new doctrine out of whole cloth. This interpretation is the Ninth Circuit's alone; I have found no case outside our circuit that reads *Yee* as the majority reads it. After today's decision, the possibility of capture of any part of a premium by a tenant renders a rent control ordinance unconstitutional. Even if two qualified experts present evidence that there is, in actual fact, no premium, a plaintiff is entitled to summary judgment that the ordinance is unconstitutional. With all due respect to my colleagues, this simply cannot be the law.

Appendix G–1

DO NOT PUBLISH OR INCLUDE IN DATABASE

ORIGINAL FILED June 21, 2000
Richard W. Wieking, Clerk, U.S. District Court,
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GENE CASHMAN, et al.,

Plaintiffs,

vs.

CITY OF COTATI, a municipal corporation,

Defendant.

No. C-99-3641 WHO

JUDGMENT

This matter having come before the Court, and the issues having been duly presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment is granted, and the Court declares defendant City of Cotati's Ordinance No. 680 (Chapter 19.14 of the Cotati Municipal Code) to be an unconstitutional regulatory taking, on its face, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

Dated: June 21, 2000.

/S/ William H. Orrick
William H. Orrick
United States District Judge

Appendix H–1

DO NOT PUBLISH OR INCLUDE IN DATABASE

FILED
JUN 21 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GENE CASHMAN, et al., Plaintiffs,	)	No. C-99-3641 WHO
vs.	)	**MEMORANDUM DECISION AND ORDER**
CITY OF COTATI, a municipal corporation, Defendant.	)	

In this action brought by plaintiffs Gene Cashman, Athena Sutsos, and Elizabeth White against defendant City of Cotati ("the City"), plaintiffs assert a facial challenge to the constitutionality of the City's Ordinance No. 680 (Chapter 19.14 of the Cotati Municipal Code) ("the Ordinance"), which establishes rent control for mobilehomes. Plaintiffs now move for summary judgment. For the reasons set forth hereinafter, the Court grants plaintiffs' motion for summary judgment, and declares the Ordinance to be an unconstitutional regulatory taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

Also before the Court is the City's motion to compel further responses to its first sets of interrogatories and requests for document production. Because the Court grants plaintiffs' motion for summary judgment, the Court need not and does not reach the City's motion to compel.

Appendix H–2

I.

On July 22, 1997, the California Court of Appeal for the First District issued a ruling in a case brought by owners of residential rental property in the City, challenging the City's 1979 general rent-control ordinance. The court found that the trial court erred in sustaining a demurrer to the complaint, and held that the plaintiffs had stated a claim for an unconstitutional taking of their property. *See 152 Valparaiso Assocs. v. City of Cotati*, 56 Cal. App. 4th 378, 383-84, 65 Cal. Rptr. 2d 551, 554-55 (1997).

As part of the Cotati City Council's subsequent settlement of that case, the Council voted to place the repeal of the 1979 rent control ordinance before the City's electorate in the November 3, 1998 election. The issue appeared in that election as Measure F.

On September 23, 1998, the Cotati City Council adopted the Ordinance, which added Chapter 19.14 to the Cotati Municipal Code, and Measure F passed.

On November 3, 1998, voters approved Measure F, thus repealing the City's 1979 general rent control ordinance. The Ordinance took effect on December 19, 1998, establishing mobilehome rent control in the City.[1]

Chapter 19.14 of the Municipal Code is entitled "Mobilehome Park Space Rent Stabilization." Section 19.14.004(a) provides:

> (a) Except as provided in subsections (b) and (c) of this section, from and after the effective date of this chapter, the space rent payable for use or occupancy of any mobilehome space shall not be

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[1] The Ordinance is twenty-four pages long, and appears in its entirety as Exhibit A to the plaintiff's complaint.

increased within twelve (12) months of the effective date of any preceding rent increase.

Said increase shall not exceed

(i) one hundred (100) percent of the change in the Consumer Price Index, or

(ii) six percent, whichever may be less.

Ordinance § 19.14.004(a).

Section 19.14.004(c) specifies methods to be followed when a mobilehome park owner desires to charge a space rent exceeding the amount permitted in subsection (a).

Section 19.14.006 provides that proposed annual rent increases exceeding the amounts specified in Section 19.14.004 are subject to an administrative review process. Section 19.14.006 sets out a detailed procedure for seeking a rent increase greater than that stated in section 19.14.004.

Section 19.14.150 establishes rent control for vacant mobilehome space, with certain exceptions. That section provides, in relevant part:

(a) Except as otherwise provided in this Sec. 19.14.150, a mobile home park owner shall not charge a new base rent or increase the rent for a mobile home space because that space has become vacant or the tenancy with respect to that space has terminated. A mobilehome park owner shall be permitted to charge a new base rent for a mobilehome space whenever a lawful space vacancy occurs. For purposes of this chapter, a lawful space vacancy is defined as follows:

(1) A vacancy of the mobilehome space occurring because of the termination of the tenancy of the affected mobilehome tenant in accordance with the Mobilehome Residency Law, California Civil Code sections 798.55 through 798.60, as amended, or

(2) A vacancy of the mobilehome space arising from the voluntary removal of a mobilehome from the mobilehome space by the affected mobilehome tenant. . . .

. . . . .

(c) In the absence of a lawful vacancy of the mobilehome space, a park owner is prohibited from raising rent upon a sale of a mobilehome on site to a tenant-to-be or current tenant.

Ordinance § 19.14.150(a)(b)(c).

The purpose of the Ordinance is set forth at § 19.14.001(d):

The purpose of this chapter is to stabilize the rate of mobilehome park space rental rates in order to:

(1) prevent exploitation of the shortage of vacant mobilehome park spaces.

(2) prevent excessive and unreasonable mobilehome park space rent increases.

(3) rectify the disparity of bargaining power which exists between mobilehome park residents and mobilehome park owners.

(4) provide-mobilehome park owners with a guaranteed rate of annual space rent increase which accurately reflects the rate of inflation and increases in their expenses, and

(5) provide a process for ensuring mobilehome park owners a fair, just and reasonable return on their parks in cases where the guaranteed annual space rent increase provided by this chapter proves insufficient.

(6) provide continued rent control through the transfer of a mobilehome-on-site (i.e. on the mobilehome pad) to a new mobilehome owner to prevent exploitative rental increases which take place when vacancy decontrol is either in effect or practiced by park owners.

(7) provide options in the duration of tenancies to prospective mobilehome tenants to prevent oppressive adhesion contracts from being imposed on new park tenants.

Ordinance § 19.14.001(d).

The Ordinance contains the following factual findings:

The City Council finds the following facts to be true and makes these factual findings in support of the adoption of this chapter:

(1) Almost all of mobilehomes in the City are located in rented spaces in mobilehome parks.

(2) In the City, there are 3 mobilehome parks containing 107 spaces.

(3) Mobilehomes in mobilehome parks provide an important alternative form of housing for City residents.

(4) A significant number of mobilehome park residents are older individuals.

(5) A significant number of mobilehome owners are on fixed incomes.

(6) A significant number of mobilehome owners are low or lower income.

(7) Nearly all mobilehome park residents own and occupy their mobilehomes and have made a substantial monetary investment to live in a mobilehome park.

(8) Residents of a mobilehome park have a very limited mobility due to the difficulty and expense of relocating a mobilehome.

(9) There is a limited amount of alternative housing affordable to and suitable for the typical mobilehome park resident and mobilehome parks are a valuable resource of affordable housing.

(10) The vacancy rate among mobilehome park spaces is 0%. Given the low vacancy rate, it is extremely difficult for mobile home owners to move their mobile homes in the event they are evicted or must find alternative mobile home spaces because of escalating and unreasonable rents being charged for the space where their mobile homes are currently

located. This has been especially true for elderly persons living on fixed social security or retirement incomes.

(11) Without the City's 1979 rent stabilization ordinance being in place, the vacancy rates cited above and vacancy rates which Cotati mobile home parks have historically enjoyed would have given mobilehome park owners a virtual oligopoly where market forces do not influence space rental pricing.

(12) Under the County of Sonoma's voluntary mediation program for the resolution of mobile-home rent disputes, between 1985 and 1987, park owners proposed annual rent increases averaging 9.6%, nearly four times the rate of general price increases according to the CPI for Sonoma County. After mandatory arbitration was established, and a rent control chapter was adopted in the County, requested rent increases were generally twice or more of the approved rent increases. Approved rent increases, on the average, began to mirror the CPI.

(13) As to mobilehome space rents in particular, the 1979 rent stabilization ordinance has succeeded in its broad objectives and rent stabilization laws should be enacted to continue such beneficial results in the event that said 1979 rent stabilization ordinance is repealed in November 1998.

(14) Since the adoption of the 1979 rent stabilization ordinance, the City has construed its provisions as providing vacancy control: that is, upon the tenant's vacating of a rental unit or rental space, his/her successor tenant is entitled to the same rent previously charged to the vacating tenant.

> The City Council finds that it would be desirable to continue to provide prospective mobilehome park tenants with an option to choose between a long-term lease and a periodic tenancy of less than one year in duration. The terms offered under typical long-term leases by some park owners are excessively long, oppressive, one-sided adhesion agreements. Such an option furthers a legitimate governmental objective and is not in conflict with or preempted by state law. Furthermore, the sale of mobilehomes on site subjects mobilehome coach owners to unreasonably suppressed resale rates due to oppressively high rental adjustments upon rent de-control. The City Council finds that it would be desirable to continue to provide vacancy control in its rent stabilization program as hereunder provided.
>
> (15) The City Council further finds that there has been and continues to be a shortage of spaces for the relocation of mobilehomes in the City, a condition which results in very low vacancy rates and tends to prevent normal competition between the owners and tenants of mobilehome parks. The need for effective and fair mobilehome park space rent stabilization continues to exist in Cotati in 1998 as it did in 1979.

Ordinance § 19.14.001(c).

The Ordinance applies to only three properties in the City: Sierra Mobile Home Park, Ramble Creek Mobile Home Park, and Countryside Mobile Home Park. Plaintiff Gene Cashman is general partner in Sierra Mobile Home Park. Plaintiff Athena Sutsos is 50 percent owner of Ramble Creek Mobile Home Park. Plaintiff Elizabeth White is owner of Countryside Mobile Home Park. Each of the plaintiffs had an ownership interest in

their mobilehome park on or before the date the Ordinance was adopted.

Plaintiffs contend that the Ordinance, on its face, is a land use regulation that imposes an unlawful taking of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution because it fails to substantially further legitimate state interests. They seek a declaratory judgment that the Ordinance effects an unconstitutional taking, and is thus void, unenforceable, and invalid. They also seek injunctive relief.

II.

A.

The Court will begin with the City's argument that the entire complaint is time-barred. The City argues that the Ordinance merely continues the portions of the repealed general rent control ordinance ("repealed ordinance") that applied to mobilehomes. Thus, the City argues that any claim the plaintiffs might have would have arisen in 1979, when the repealed ordinance was adopted. Thus, the City contends that plaintiffs' claims are time-barred.

The City's theory that the Ordinance is merely a continuation of the repealed ordinance is incorrect. The language of the repealed ordinance, Chapter 19.12 of the Cotati Municipal Code, is entirely different from the language of the Ordinance. In addition, the repealed ordinance was repealed, not amended, and replaced with an entirely new ordinance relating to mobile home rent control. Moreover, the Ordinance contains a express provision for vacancy control, while the repealed rent control ordinance does not. It cannot reasonably be argued that the Ordinance is merely a continuation of the repealed ordinance.

The Ordinance was adopted on September 23, 1998. Plaintiffs' lawsuit was filed less than one year later, on July 29,

1999. The statute of limitations on facial constitutional challenges is one year from the date the claim becomes ripe. *Tevald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-88 (9th Cir. 1993). The Supreme Court has held that facial challenges are generally ripe the moment. the challenged ordinance is passed. *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (9th Cir. 1992); *see also Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997) (citing *Yee*, 503 U.S. at 534). As plaintiffs filed their lawsuit within one year of the enactment of the Ordinance, their lawsuit is not time-barred.

B.

The Court turns to the merits of plaintiffs' motion for summary judgment. The Takings Clause of the Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994) (citing *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897)).

The Supreme Court has recognized two types of takings: physical takings and regulatory takings. *See Yee*, 503 U.S. at 522 (1992). Plaintiffs do not contend that the Ordinance is a physical taking, but argue only that it is a regulatory taking.

Takings claims can also be divided into "facial" and applied" challenges. *Tevald, Inc.*, 998 F.2d at 686. A facial challenge involves a claim that the mere enactment of a statute constitutes a taking, while an as-applied challenge involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation. *Id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987)). Here the plaintiffs assert only a facial challenge to the Ordinance. Plaintiffs have the burden of proving that the Ordinance is facially unconstitutional. *Keystone*, 480 U.S. at 485, 501.

The Court reviewed another zoning ordinance in *Nectow*. The Court again held that it would not set aside the ordinance unless it had no foundation in reason and was a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare. *Nectow*, 277 U.S. at 187-88 (citing *Village of Euclid*, 272 U.S. at 395). The Court cautioned, however, that "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restrictions cannot be imposed if it does not bear a substantial relation to the public health, safety, moral, or general welfare." *Id.* at 188 (citing *Village of Euclid*, 272 U.S. at 395). The Court found the ordinance at issue to be unconstitutional because a special master properly found that "the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question." *Id.* at 188.

Thus, it appears that the Court must compare the purpose of the Ordinance with the reasons the City believed the Ordinance to be necessary to accomplish that purpose, and then determine whether the Ordinance is reasonably necessary to achieve those goals. *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (citation omitted) ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose.").

C.

1.

Neither party has submitted any evidence of the purposes of the Ordinance, other than those stated in the Ordinance itself. Accordingly, the Court will assume that the City's actual

purposes in enacting the Ordinance are those set forth in the Ordinance itself.

Although seven purposes for the Ordinance are itemized in the Ordinance, those purposes fall into three general categories: (1) to maintain reasonable rents for present and future mobile home residents; (2) to provide for a fair rate of return for mobilehome park owners; and (3) to provide options in the length of mobilehome park leases to prevent oppressive adhesion contracts from being imposed on new park tenants. Ordinance § 19.14,001(d).

The Court will presume that these are legitimate state purposes, as plaintiffs do not argue otherwise.

2.

The core of plaintiffs' argument is that the Ordinance, on its face, does not substantially advance legitimate state interests. Plaintiffs contend that because mobile home residents own the mobile homes in which they live, while mobilehome park owners own only the land upon which the mobilehomes rest, the rent control imposed by the Ordinance inflates the value of the mobilehomes at the expense of the mobilehome park owners. According to plaintiffs, rent control, as a matter of law, keeps the mobilehome park rents below market value. Mobilehome owners who live in rent-controlled parks can then sell their mobilehomes in place at a premium to new owners, who can then take advantage of the below-market rent. Plaintiffs contend that because the Ordinance permits mobilehome owners to sell their mobilehomes at a premium to capture the value of the below-market rent, the Ordinance does not actually advance its stated purpose of maintaining affordable housing in mobilehome parks. Plaintiffs submit no evidence of the actual effects of the Ordinance, but rely almost entirely on the Supreme Court's analysis in *Yee*, and the Ninth Circuit's analysis in *Richardson*.

In *Yee*, the issue was whether a local California mobile home rent control ordinance amounted to a *physical* taking of the park owners' property. *Yee*, 503 U.S. at 523. Although the Court found that the ordinance was not a physical taking, it discussed, in dicta, some aspects of how the ordinance might be analyzed under the Court's regulatory taking jurisprudence. The plaintiff in *Yee* argued that because the park owner owns only the land, and the mobilehome is owned by the mobilehome owner, "any reduction in the rent for a mobile home pad causes a corresponding increase in the value of a mobile home, because the mobile home owner now owns, in addition to a mobile home, the right to occupy a pad at a rent below the value that would be set by the free market." *Id.* at 526 (citation omitted). Because, under California law, a mobilehome owner can "sell the mobile home in place, the mobile home owner can receive a premium from the purchaser corresponding to this increase in value." *Id.* at 527. The Court recognized that this effect of transferring wealth from the park owner to incumbent mobile home residents, but not to future purchasers, "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530 (citing *Nollan*, 483 U.S. at 834-35). The Court did not decide the regulatory taking issue, however, because the issue was "not fairly included in the question on which we granted certiorari." *Id.* at 533.

In *Richardson*, the Ninth Circuit addressed the issue directly. The relevant issue in *Richardson* was whether a Honolulu condominium rent control ordinance amounted to an unconstitutional regulatory taking. *Richardson*, 124 F.3d at 1153. In *Richardson*, as here, the tenants owned their dwelling, but the landlords leased the land upon which the dwellings stood. *Id.* at 1154. The Honolulu rent control ordinance placed tight restrictions on rent increases, and provided that the owner-occupant of the condominium could sell the

condominium with the lease at its current rent to a person who intended to occupy the condominium. *Id.* at 1163-64.

As here, the plaintiff argued that the Honolulu rent control ordinance violated the Takings Clause because it failed to substantially further its stated public purposes. *Id.* at 1164. The City enacted the Ordinance to provide renegotiated land lease rents "which are afforda'·le to condominium apartment owner-occupants and fair to lessors" and to "maintain [affordable housing] for owner-occupants." *Id.* at 1165 (brackets in original).

The Ninth Circuit found the ordinance unconstitutional because:

> [i]t regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking.

Id. at 1165-66 (citations omitted).

Unfortunately, although *Richardson* was decided on summary judgment, neither the Ninth Circuit nor the district court opinion state what evidence, if any, either court relied upon in finding the ordinance unconstitutional. It appears that the courts simply compared the stated purposes of the ordinance

to the language of the ordinance and found the ordinance unconstitutional as a matter of law.

Here, the City submits a 1990 report to the City from Stephen D. Lewis as expert opinion that mobilehome owners in Sonoma County are so distrustful of rent control that they will pay less for a mobilehome that is subject to rent control than for one that is not under rent control. (*See generally*, Decl. of Stephen D. Lewis.) The City thus attempts to distinguish the factual underpinnings of the *Richardson* decision by demonstrating that the peculiarities of the Sonoma County mobilehome market preclude a mobilehome owner from selling his mobilehome for a premium attributable to rent control. Plaintiffs object strenuously that the Lewis Declaration (and a similar declaration from Kenneth D. Baar) are inadmissible on numerous grounds.

The Court need not consider these evidentiary objections, however, because even if the Court considered the Lewis and Baar declarations, the outcome would be the same. The Ninth Circuit found, in *Richardson*, that the Honolulu ordinance was unconstitutional because of "[t]he absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium[.]" *Richardson*, 124 F.3d at 1166. The Ordinance currently before the Court is similarly deficient on its face. Nothing in the language of the Ordinance prevents a mobilehome owner from capitalizing on his below-market rents by selling his mobilehome for a premium, thus transferring wealth from park owner to mobilehome owner. The possibility that transitory market distrust of rent control in Sonoma County may prevent a mobilehome owner from actually selling his mobilehome at a premium does not cure the Ordinance's facial defects. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 2000 U.S. App. LEXIS 13941 at *26 (9th Cir. June 15, 2000) (holding that, in a facial takings challenge, the court looks only to the regulation's general scope and

dominant features, and not to the effect of the regulation in specific circumstances).

The City also argues that the Ordinance is distinguishable from the Honolulu ordinance at issue in *Richardson*. This argument is unavailing. Both cases involve tenant-owned dwellings on leased land subject to rent control. The key to both statutes is that they permitted a tenant to obtain a windfall at the landlord's expense by selling rent-controlled property at a premium equal to the difference between the rent-controlled rent and market-value rent. In addition, both ordinances were designed to maintain affordable housing, lessen the disparity in bargaining power between the landlord and tenant, and yet still permit the landlord a reasonable return on its property. In short, there is no material difference between the Ordinance at issue here, and the ordinance at issue in *Richardson*. As the Ordinance does not substantially further legitimate state interests, as a matter of law, the Ordinance is an unconstitutional regulatory taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for summary judgment is granted, and the Court declares the Ordinance to be an unconstitutional regulatory taking, on its face, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

2. The Court does not reach the City's motion to compel.

Dated: June 21, 2000. /s/ William H. Orrick
William H. Orrick
United States District Judge

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 2. PROPERTY
PART 2. REAL OR IMMOVABLE PROPERTY
TITLE 2. ESTATES IN REAL PROPERTY
CHAPTER 2.5. MOBILEHOME RESIDENCY LAW
ARTICLE 6. TERMINATION OF TENANCY

§ 798.56. Authorized reasons for termination

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, that constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome park, including, but not limited to, within the homeowner's mobilehome.

However the tenancy may not be terminated for the reason specified in this subdivision if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park that is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e)(1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate the tenancy. For purposes of this subdivision, the five-day period does not include the date the payment is due. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. A copy of this notice shall be sent to the persons or entities specified in subdivision (b) of Section 798.55 within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

(2) Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision. If the homeowner does not pay prior to the expiration of the three-day notice period, the homeowner shall remain liable for all payments due up until the time the tenancy is vacated.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(5) If a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within the preceding 12-month period, no written three-day notice shall be required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

In that event, the management shall give written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to

the legal owner, each junior lienholder, and the registered owner of the mobilehome, if other than the homeowner, as specified in paragraph (b) of Section 798.55, by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner.

(6) When a copy of the 60 days' notice described in paragraph (5) is sent to the legal owner, each junior lienholder, and the registered owner of the mobilehome, if other than the homeowner, the default may be cured by any of them on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice, if all of the following conditions exist:

(A) A copy of a three-day notice sent pursuant to subdivision (b) of Section 798.55 to a homeowner for the nonpayment of rent, utility charges, or reasonable incidental service charges was not sent to the legal owner, junior lienholder, or registered owner, of the mobilehome, if other than the homeowner, during the preceding 12-month period.

(B) The legal owner, junior lienholder, or registered owner of the mobilehome, if other than the homeowner, has not previously cured a default of the homeowner during the preceding 12-month period.

(C) The legal owner, junior lienholder or registered owner, if other than the homeowner, is not a financial institution or mobilehome dealer.

If the default is cured by the legal owner, junior lienholder, or registered owner within the 30-day period, the notice to remove the mobilehome from the park described in paragraph (5) shall be rescinded.

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use request has been granted.

(4) The notice requirements for termination of tenancy set forth in Sections 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, that conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(h) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government Code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (g) of this section.

(i) For purposes of this section, "financial institution" means a state or national bank, state or federal savings and loan association or credit union, or similar organization, and mobilehome dealer as defined in Section 18002.6 of the Health and Safety Code or any other organization that, as part of its usual course of business, originates, owns, or provides loan servicing for loans secured by a mobilehome.

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 2. PROPERTY
PART 2. REAL OR IMMOVABLE PROPERTY
TITLE 2. ESTATES IN REAL PROPERTY
CHAPTER 2.5. MOBILEHOME RESIDENCY LAW
ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

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§ 798.73. Removal upon sale to third party; conditions

The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement. However, in the event of a sale to a third party, in order to upgrade the quality of the park, the management may require that a mobilehome be removed from the park where:

(a) It is not a "mobilehome" within the meaning of Section 798.3.

(b) It is more than 20 years old, or more than 25 years old if manufactured after September 15, 1971, and is 20 feet wide or more, and the mobilehome does not comply with the health and safety standards provided in Sections 18550, 18552, and 18605 of the Health and Safety Code and the regulations established thereunder, as determined following an inspection by the appropriate enforcement agency, as defined in Section 18207 of the Health and Safety Code.

(c) The mobilehome is more than 17 years old, or more than 25 years old if manufactured after September 15, 1971, and is less than 20 feet wide, and the mobilehome does not comply with the construction and safety standards under

Sections 18550, 18552, and 18605 of the Health and Safety Code and the regulations established thereunder, as determined following an inspection by the appropriate enforcement agency, as defined in Section 18207 of the Health and Safety Code.

(d) It is in a significantly rundown condition or in disrepair, as determined by the general condition of the mobilehome and its acceptability to the health and safety of the occupants and to the public, exclusive of its age. The management shall use reasonable discretion in determining the general condition of the mobilehome and its accessory structures. The management shall bear the burden of demonstrating that the mobilehome is in a significantly rundown condition or in disrepair. The management of the park shall not require repairs or improvements to the park space or property owned by the management, except for damage caused by the actions or negligence of the homeowner or an agent of the homeowner.

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 2. PROPERTY
PART 2. REAL OR IMMOVABLE PROPERTY
TITLE 2. ESTATES IN REAL PROPERTY
CHAPTER 2.5. MOBILEHOME RESIDENCY LAW
ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park and that the selling homeowner or his or her agent give notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section.

Appendix L–1

ORDINANCE NO. 680

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COTATI, STATE OF CALIFORNIA, ADDING CHAPTER 19.14 TO THE COTATI MUNICIPAL CODE TO ESTABLISH THE MOBILEHOME PARK SPACE RENT STABILIZATION PROGRAM

The City Council fo the City of Cotati does ordain as follows:

SECTION 1. Chapter 19.14, is hereby added to the Cotati Municipal Code to read as follows:

CHAPTER 19.14

MOBILEHOME PARK SPACE RENT STABILIZATION

SECTIONS:

19.14.001	FINDINGS AND PURPOSE
19.14.002	DEFINITIONS
19.14.003	BASE RENT - INITIAL CALCULATION
19.14.004	RESIDENTIAL RENT INCREASE LIMITATIONS
19.14.005	INFORMATION TO BE SUPPLIED TO TENANTS AND TENANTS-TO-BE
19.14.006	THE RENT DISPUTE RESOLUTION PROCESS
19.14.007	RIGHTS OF A "TENANT-TO-BE"
19.14.008	SUBPOENA POWER

19.14.009	CONSOLIDATION OF PETITIONS
19.14.010	STANDARDS OF REVIEW
19.14.020	NET OPERATING INCOME
19.14.030	OBLIGATIONS OF THE PARTIES
19.14.040	TENANT'S RIGHT OF REFUSAL
19.14.050	RETALIATORY ACTS; TENANTS' RIGHT TO ORGANIZE
19.14.060	SOLICITATION OF ANY PETITIONS BY THE PARK OWNERS ARE WITHOUT FORCE OR LEGAL EFFECT WITHIN CITY'S PROGRAM
19.14.070	FEES
19.14.080	EXEMPTION FROM FEES
19.14.090	NONWAIVERABILITY
19.14.110	PENALTIES AND REMEDIES
19.14.120	RIGHTS OF AFFECTED TENANTS RESERVED
19.14.121	TENANT COMPLAINTS
19.14.130	REVIEW BY THE CITY COUNCIL
19.14.140	SEVERABILITY
19.14.150	VACANCY CONTROL AND DE-CONTROL—ESTABLISHMENT OF NEW BASE RENT

19.14.001. FINDINGS AND PURPOSE.

(a) In 1979, the people of the City of Cotati enacted by initiative a rent stabilization ordinance which had as its purpose the control and stabilization of rents charged by owners of residential rental property, including mobile home parks. That rent stabilization ordinance has remained in effect to the present time. As to rents charged for mobile home spaces in mobile home parks, among others, tile ordinance has achieved and continues to achieve its objective to control the amount of rent charged by mobile home park owners for the rental of mobile home spaces.

(b) As the result of a settlement agreement entered into by and between the City and the petitioners in the case entitled *152 Valparaiso Associates, et al. v. City of Cotati, et al.*, the City Council has placed the question of repealing said 1979 rent stabilization ordinance on the ballot for November 3, 1998. In the event said rent stabilization ordinance is repealed by the voters on November 3, 1998, the beneficial protections afforded by that ordinance to mobile home owners will be eliminated. For the reasons stated herein below and those adduced during the public hearings concerning this chapter, the City Council has determined that if the 1979 rent stabilization ordinance is repealed by the voters on November 3, 1998, as to mobile home space rentals, it is necessary to replace same with this chapter.

(c) The City Council finds the following facts to be true and makes these factual findings in support of the adoption of this chapter:

(1) Almost all of mobilehomes in the City are located in rented spaces in mobilehome parks.

(2) In the City, there are 3 mobilehome parks containing 107 spaces.

(3) Mobilehomes in mobilehome parks provide an important alternative form of housing for City residents.

(4) A significant number of mobilehome park residents are older individuals.

(5) A significant number of mobilehome owners are on fixed incomes.

(6) A significant number of mobilehome owners are low or lower income.

(7) Nearly all mobilehome park residents own and occupy their mobilehomes and have made a substantial monetary investment to live in a mobilehome park.

(8) Residents of a mobilehome park have very limited mobility due to the difficulty and expense of relocating a mobilehome.

(9) There is a limited amount of alternative housing affordable to and suitable for the typical mobilehome park resident and mobilehome parks are a valuable resource of affordable housing.

(10) The vacancy rate among mobilehome park spaces is 0%. Given the low vacancy rate, it is extremely difficult for mobile home owners to move their mobile homes in the event they are evicted or must find alternative mobile home spaces because of escalating and unreasonable rents being charged for the space where their mobile homes are currently located. This has been especially true for elderly persons living on fixed social security or retirement incomes.

(11) Without the City's 1979 rent stabilization ordinance being in place, the vacancy rates cited above and vacancy rates which Cotati mobile home parks have historically enjoyed would have given mobilehome park owners a virtual oligopoly where market forces do not influence space rental pricing.

(12) Under the County of Sonoma's voluntary mediation program for the resolution of mobilehome rent

disputes, between 1985 and 1987, park owners proposed annual rent increases averaging 9.6%, nearly four times the rate of general price increases according to the CPI for Sonoma County. After mandatory arbitration was established, and a rent control chapter was adopted in the County, requested rent increases were generally twice or more of the approved rent increases. Approved rent increases, on the average, began to mirror the CPI.

(13) As to mobilehome space rents in particular, the 1979 rent stabilization ordinance has succeeded in its broad objectives and rent stabilization laws should be enacted to continue such beneficial results in the event, that said 1979 rent stabilization ordinance is repealed in November 1998.

(14) Since the adoption of the 1979 rent stabilization ordinance, the City has construed its provisions as requiring vacancy control: that is, upon the tenant's vacating of a rental unit or rental space, his/her successor tenant is entitled to the same rent previously charged to the vacating tenant. The City Council finds that it would be desirable to continue to provide prospective mobilehome park tenants with an option to chose between a long-term lease and a periodic tenancy of less than one year in duration. The terms offered under typical long-term leases by some park owners are excessively long, oppressive, one-sided adhesion agreements. Such an option furthers a legitimate governmental objective and is not in conflict with or preempted by state law. Furthermore, the sale of mobilehomes on site subjects mobilehome coach, homeowners to unreasonably suppressed resale rates due to oppressively high rental adjustments upon rent de-control. The City Council finds that it would be desirable to continue to provide vacancy control in its rent stabilization program as hereunder provided.

(15) The City Council further finds that there has been and continues to be a shortage of spaces for the relocation

of mobilehomes in the City, a condition which results in very low vacancy rates and tends to prevent normal competition between the owners and tenants of mobilehome parks. The need for effective and fair mobilehome park space rent stabilization continues to exist in Cotati in 1998 as it did in 1979.

(d) The purpose of this chapter is to stabilize the rate of mobilehome park space rental rates in order to:

(1) prevent exploitation of the shortage of vacant mobilehome park spaces;

(2) prevent excessive and unreasonable mobilehome park space rent increases:

(3) rectify the disparity of bargaining power which exists between mobilehome park residents and mobilehome park owners;

(4) provide mobilehome park owners with a guaranteed rate of annual space rent increase which accurately reflects the rate of inflation and increases in their expenses; and

(5) provide a process for ensuring mobilehome park owners a fair, just and reasonable rate of return on their parks in cases where the guaranteed annual space rent increase provided by this chapter proves insufficient.

(6) provide continued rent control through the transfer of a mobilehome-on-site (i.e. on the mobilehome pad) to a new mobilehome owner to prevent exploitative rental increases which take place when vacancy decontrol is either in effect or practiced by park owners.

(7) provide options in the duration of tenancies to prospective mobilehome tenants to prevent oppressive adhesion contracts from being imposed upon new park tenants.

19.14.002. DEFINITIONS.

(a) "Affected Tenants". Those tenants whose space is not covered by a valid lease meeting the requirements as outlined in Sec. 798.17(b) of the California Civil Code or otherwise legally exempt from local rent control regulation. Affected tenants are to be notified that a space rent increase is to become effective. For purposes of providing notice of the increase, providing copies of the rent stabilization chapter, and support of a rent arbitration petition, each space subject to a rental increase shall be deemed to have only one "affected tenant" for administrative convenience to the park owners. The reference to "all affected tenants" will refer to one representative tenant from each space subject to the proposed rental increase.

(b) "Arbitrator". A person (I) who is neither a tenant as that term is defined in this chapter nor who has an interest in a mobilehome park of a nature that would require disqualification under the provisions of the Political Reform Act of 1974 if the person were an elected state official and (2) a person whom the Clerk of the Cotati City Mobilehome Space Rent Stabilization Program (see (e) below) ("Clerk") determines meets one the following criteria:

(i) completion of a Juris Doctor or equivalent degree from a school of law and completion of a formal course of training in arbitration which, in the sole judgment of the Clerk, provides that person with the knowledge and skills to conduct a space rent dispute arbitration in a professional and successful manner; or

(ii) completion of at least three arbitration proceedings for a Superior Court or other public entity that involved issues the Clerk

finds similar to those raised in space rent dispute arbitrations; or

(iii) served as a California Superio, or Municipal Court pro tempore judge,

(c) "Base Rent". The authorized rent, calculated pursuant to the provisions of Section 19.14,003, plus any rent increase allowed under this chapter or any rent adjustment attributable to vacancy decontrol as provided in Section 19.14.150.

(d) "Base Year". Calendar year 1998.

(e) "Clerk". Clerk of the Cotati City Mobilehome Space Rent Stabilization Program, who shall be the City Manager or his or her designee.

(f) "Capital improvements". Those improvements that materially add to the value of the property and appreciably prolong its useful life or adapt it to new uses, and which may be amortized over the useful remaining life of the improvement to the property. The term "Capital Improvements" does not include those costs associated with the normal maintenance and upkeep of facilities and premises which were reasonably intended to be part of consideration provided by the mobilehome park as rent. Substantial rehabilitation of the park that is necessitated as a result of the parkowners neglect, permissive waste, deferred maintenance or acts of God shall not be regarded to be capital improvements to the extent that they restore facilities and premises to the conditions reasonably bargained for by the mobilehome park tenants. Proposed capital improvements claims must set forth an amortization table spreading the cost of the improvement over its proven useful life. Rents based on such costs, if approved, must be separately itemized on the monthly rent invoice. In addition, the beginning date upon which such rents may be imposed and the ending date upon which said rents may no longer be

imposed, must be stated on each monthly rent invoice submitted during the time said rents are charged to the tenant. Monthly rent shall be decreased for such amortized capital improvement expenses at the end of the amortization period. Failure to do so shall be regarded to be an unauthorized increase in rent. Capital improvements must be for the primary benefit, use and enjoyment of the tenants of the entire park, and costs must be allocated over all boundaries of the improvement

(g) "Consumer Price Index". Consumer Price Index for all Urban Consumers San Francisco-Oakland Area, published by the U.S. Department of Labor, Bureau of Labor Statistics.

(h) "Housing Service". A service provided by the owner related to the use or occupancy of a mobilehome space, which is neither a capital improvement nor substantial rehabilitation as those terms are defined heroin, including but not limited to, repairs, replacement, maintenance, painting lighting, heat, water, laundry facilities, refuse removal, recreational facilities, parking, security service, and employee services.

(i) "Mobilehome". A structure designed for human habitation and for being moved on a street or highway under permit pursuant to section 35790 of the California Vehicle Code. "Mobilehome" includes a manufactured home, as defined in section 18007 of the California Health and Safety Code, and a mobile home, as defined in section 18008 of the California Health and Safety Code, but does not include a recreational vehicle, as defined in section 799.29 of the California Civil Code and section 18010 of the California Health and Safety Code, or a commercial coach, as defined in section 18601.8 of the California Health and Safety Code except when such a vehicle has continuously remained within a mobilehome park for a period in excess of nine months.

(j) "Mobilehome Park". Any area of land within the incorporated areas of the City of Cotati where two (2) or more

mobilehome spaces are rented, or held out for rent, to accommodate mobilehomes used for human habitation.

(k) "Mobilehome Park Owner". Any owner, lessor, or sublessor of a mobilehome park in the incorporated areas of the City of Cotati who receives or is entitled to receive rent for the use or occupancy of any mobilehome space thereof, and the representative, agent, or successor of such owner, lessor, or sublessor, and who reports to the Internal Revenue Service any income received or loss of income resulting from such ownership or claims any expenses, credits, or deductions because of such ownership.

(l) "Mobilehome Space". Any site within a mobilehome park located in the incorporated areas of the City of Cotati intended, designed, or used for the location or accommodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith except "new construction" as defined by Civil Code section 798.45. The term "Mobilehome Space" shall also include, for purposes of this rent stabilization ordinance, rentable spaces within mobilehome parks which have been occupied by a "recreational vehicle" as defined by Civil Code section 799.29 for a period of nine (9) months or more.

(m) "Mobilehome Space Tenant". A tenant, subtenant, lessee, or sublessee, or any other person entitled to the use or occupancy of any mobilehome space not otherwise a party to a rental agreement exempt from regulation under this chapter pursuant to Civil Code section 798.17.

(n) "Net Operating Income". Net operating income as defined in Section 19.14.020 of this chapter.

(o) "Owner". A mobilehome park owner.

(p) "Party". "Party" as used in this chapter refers to any affected mobilehome tenant and/or owner involved in proceedings under this chapter.

(q) "Percent Change in Consumer Price Index". The annual percent change in the Consumer Price Index CCPI"), calculated to the nearest tenth, published for the month of June, issued in the month of July. In the event that an index is not published for the month of June, the closest preceding month for which an index is published shall be used. It is the intent of this chapter to fix the CPI in the beginning of the fiscal year, for the rest of that fiscal year barring an unforseen failure to publish a CPI for the month of June.

(r) "Rent". Mobilehome Space rent.

(s) "Rent Increase". Any additional space rent demanded of or paid by a tenant for a mobilehome space including any reduction in leasing services without a corresponding reduction; in the amount demanded or paid for rent. Said increase shall be 1 .) uniform in percentage rate relative to current base rent or 2.) uniform in dollar amount relative to base rent. Failure to reduce rent at the end of an amortization period for a capital improvement or for separately billed utilities will also be regarded to constitute an unauthorized rent increase for the purposes of this chapter.

(t) "Rent Stabilization Administration Fee". The fee established from time to time by resolution of the City Council in accordance with the provisions of Section 19.14.070 herein.

(u) "Space Rent". The total consideration, including any bonus, benefit, or gratuity, demanded or received by a mobilehome park owner for or in connection with the use or occupancy of a mobilehome space or any housing services provided with the mobilehome space. Space rent shall not include any amount paid for the use or occupancy of a mobilehome dwelling unit, unless the amount paid for the use or occupancy of a mobilehome is or includes consideration paid to a mobilehome park owner under a rental agreement or other document evidencing tenancy of the mobilehome.

(v) "Substantial Rehabilitation". That work done by an owner to a mobilehome space or to the common areas of the mobilehome park, exclusive of a capital improvement as that term is defined herein, the value of which exceeds two hundred dollars ($200.00) and which is performed whether to secure compliance with any state or local law or to repair damage resulting from fire, earthquake, or other casualty or natural disaster, to the extent such work is not reimbursed by insurance.

(w) "Tenant". Mobilehome Space Tenant.

(x) "Tenant-to-be". A person who is not currently a tenant in a mobilehome park but is a prospective mobilehome space tenant who desires the use of a mobilehome space as defined in this chapter and has presented himself/herself to the parkowner as such.

19.14.003. BASE RENT - INITIAL CALCULATION.

Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the lawful rent in effect for said space on the day before the effective date of this chapter. If a previously rented mobilehome space was not rented on the day before the effective date of this chapter, the owner shall not, except as hereinafter provided, demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to the effective date of this chapter.

19.14.004. RESIDENTIAL RENT INCREASE LIMITATIONS.

(a) Except as provided in subsections (b) and (c) of this section, from and after the effective date of this chapter, the space rent payable for use or occupancy of any mobilehome space shall not be increased within twelve (12) months of the effective date of any preceding rent increase.

Said increase shall not exceed:

(i) one hundred (100) percent of the percent change in the Consumer Price index, or

(ii) six percent, whichever may be less.

(b) If a park owner wishes to apportion to each space on a pro rata basis the allowable percentage of any current rent stabilization administration fee, in addition to any increase of space rent in accordance with preceding section (a), the following provision shall apply:

(i) The owner shall provide to all affected tenants documentation supporting the allowable amount to be collected in order to recover a portion of rent stabilization administration fees. At a minimum such documentation shall include: billing notices or other equivalent documents from the City imposing the rent stabilization administration fee; a copy of Section 19.14.070 which authorizes the apportionment of rent stabilization administration fees; and the calculations used by the owner to apportion the cost of the allowable percentage among the affected tenants. In addition, the owner shall provide all affected tenants with the address and telephone number of the Clerk and the fact that the affected tenant may contact the Clerk for an explanation of the provisions of this chapter.

(ii) A rent increase approved pursuant to the provisions of this subsection and in accordance with the procedure set forth in Section 19.14.006 shall not be considered part

of the rent base upon which future rent increases can be made.

(c) In the event an owner wishes to increase the rent payable for any mobilehome space within the twelve (12) month period more than the mount permitted in subsection (a) for any reason other than that stated in subsection (b) herein, the procedures set forth in Sections 19.14.005 and 19.14.006 shall be followed. In the event an owner wishes to increase the rent payable for any mobilehome space within the twelve (12) month period more than three hundred (300) percent of the Percent Change in the Consumer Price Index, a mandatory meet-and-confer meeting and arbitration shall automatically be required to show good cause why such an increase is necessary. The arbitrator may reduce this proposed increase to a figure determined upon the evidence submitted by the park owner or his/her representative to be a fair return upon investment. Any rent increase permitted under this subsection (c) must be implemented and noticed by the park owner such that it becomes effective within twelve (12) months of the date of the arbitrator's final decision. Failure to timely notice any such rent increase shall result in the park owner's forfeiture of his/her/its right to do so.

(d) A notice of rent increase given by an owner pursuant to Section 19.14.004(a), (b) or (c) shall be given in writing at least ninety (90) days before any rent increase is to take effect.

(e) A notice of rent increase incorporating within it a proposed or completed capital improvement which is not otherwise authorized as a pass-through pursuant to Civil Code Section 798.49 must be claimed within twelve months of the completion of the project or construction or the owner's receipt of the final billing therefor, whichever occurs later.

19.14.005. INFORMATION TO BE SUPPLIED TO TENANTS AND TENANTS-TO-BE.

(a) Within thirty (30) days after the effective date of the ordinance which adopted this section and prior to the re-renting of each mobilehome space thereafter, the owner shall supply each affected tenant or tenant-to-be, respectively, with a current copy of this chapter. Within thirty (30) days after having provided a copy of this chapter to each existing, affected tenant, the owner shall provide a written statement, under penalty of perjury, to the Clerk attesting to the owner's compliance herewith and identifying each tenant to whom said copy was delivered. As to mobilehome spaces which are rented after the effective date of this chapter and under a new rental agreement or an extension of a rental agreement in effect at the time this chapter becomes effective, within thirty (30) days after that new rental agreement or extension becomes effective, the owner shall provide a written statement, under penalty of perjury, to the Clerk attesting to the owner's provision of a copy of this chapter to the person(s) renting said spaces and to all tenants-to-be with respect to said spaces in compliance with this subsection (a). Said attestation shall also identify all such persons to whom a copy of this chapter was delivered.

(b) Whenever the owner serves a notice of rent increase, except a notice of rent increase provided pursuant to Section 19.14.004(a), the owner shall at the same time and in the same manner serve the affected tenant or tenant-to-be with a notice that sets forth all of the following information:

(1) The amount of the rent increase both in dollars and as a percentage of existing rent and documentation supporting the level of increase desired, including at a minimum: a summary of the unavoidable increases in maintenance and operating expenses; a statement of the cost, nature, amortization, and allocation among mobilehome spaces of any substantial rehabilitation or capital improvement; a

summary of the increased cost of the owner's debt service and the date and nature of the sale or refinancing transaction; a summary of the owner's net operating income of the preceding twenty-four (24) months and other relevant information that supports the level of rent increase desired.

(2) The identity of all other affected tenants and the spaces which they rent.

(3) The address and telephone number of the Clerk and: a.) the fact that the tenant is encouraged to contact the Clerk for an explanation of the provisions of this chapter; and b.) documentation supporting the level of increase is on file with the Clerk.

(4) A copy of the official petition form as prepared and provided by the Clerk which initiates the process established by this chapter.

(5) In addition, the park owner shall place on file with the Clerk two copies of: documentation supporting the level of increase desired, including at a minimum: a summary, of the unavoidable increases in maintenance and operating expenses; a statement of the cost, nature, amortization, and allocation among mobilehome spaces of any substantial rehabilitation or capital improvement; a summary of the increased cost of the owner's debt service, if any, and the date and nature of the sale or refinancing transaction, if any; a summary of the owner's net operating income of the preceding twenty-four (24) months and other relevant information that supports the level of rent increase desired. These documents will be available for inspection at the offices of the Sonoma County Community Development Commission and City Manager.

(6) If applicable, notification that the proposed rent increase exceeds 300 percent of the change in the consumer price index, and that arbitration is deemed automatically

required by the provisions of Section 19.14.004(c) without any need to file an arbitration petition. Such notices shall bear the following language: "ARBITRATION OF THE PROPOSED INCREASE IS AUTOMATICALLY REQUIRED IN THIS MATTER BY OPERATION OF LAW." Erroneous use of this notice shall be regarded as an irrevocable stipulation to the jurisdiction of the arbitrator.

(c) Prior to offering to rent a mobilehome space to a tenant-to-be, the park owner shall also serve the tenant-to-be as defined in Section 19.14,002(x) with a separate "RENTAL OPTION" notice which sets forth the recitations in capital letters set forth in Section 19.14.007, Rights of a "Tenant-To-Be".

(d) All written information and notices which are required hereunder to be provided by the owner to the tenants and/or tenants-to-be shall be written in plain, easy-to-understand language, avoiding whenever possible, the use of terms of art, technical terms or words which are peculiar to a given profession or teaching and not commonly used or understood.

(e) An owner failing to provide an affected tenant or tenant-to-be and the Clerk with the information, documents, and notices required by this section shall not be entitled to collect any rent increase otherwise authorized by this chapter from that tenant nor to any rent increase that might otherwise be awarded by an arbitrator. Such failure by the owner shall be a defense in any action"brought by the owner to recover possession of a mobilehome space or to collect any rent increase from the tenant.

19.14.006. THE RENT DISPUTE RESOLUTION PROCESS.

(a) Mandatory Meet-and-Confer Meeting. Except when a parkowner elects rent increases permitted under Section

19.14.004(a), the tenants and parkowners must, within seven (7) working days of the notice of rent increase, meet and confer with each other's representatives at City Hall. Written notice of the time, place and date of the meeting should be arranged within forty-eight (48) working hours of the notice of rent increase. If the park owners or tenants fail to agree on the time, place and date of the hearing within that forty-eight hour span and provide due notice to the Clerk, the meeting shall be set at the convenience of the Clerk. At the meeting, representatives of the parties should exchange documentary evidence that the parties in good faith then know will be used to support their respective positions in an arbitration and discuss the issues in dispute. In the case of a park owner, all financial data upon which any proposed increase is claimed shall be supplied to tenant representatives at the time of the meet and coffer meeting.

(1) Sanctions. A park owner's failure to provide the minimum information required by subsection 19.14,006(a)(2) below or attend the hearing shall require the Clerk to suspend further proceedings under this chapter. The park owner's application for a rent increase under such circumstances shall be deemed defective, without force or effect, and deemed withdrawn. Renoticing of the increase shall be required to reinitiate an application for rent increase.

(2) Minimum Meet-and Confer Information. The parkowner has a duty to provide adequate information to the tenants regarding the park's net operating income sufficient for a reasonably sophisticated inquiry into the financial status of the parkowner's business. This will consist of true and accurate book entries or other competent evidence of gross income including, but not limited to, gross rents, interest upon security and cleaning deposits, income from ancillary services (submetering of utilities, laundry facilities, etc.) and true and accurate book entries or other competent evidence of operating expenses including, but not limited to, license fees, property

taxes, utilities, insurance, management expenses, landlord performed labor, building and grounds maintenance, legal fees, auto and truck expenses, employee benefits, permits, refuse removal, ground lease payments, and similar additional expenses.

(b) Petition. If discussions between owner and tenants do not resolve the dispute between them, the tenants or their representative shall file with the Clerk a Petition for Space Rent Review and a copy of the notice of rent increase, if available, within twenty-one (21) days after the date upon which the rent increase notice is received. The Clerk shall not accept a petition for filing unless it has been signed by at least fifty-one (51) percent of all affected tenants. Upon the filing of a petition, the rent increase is not effective and may not be collected until and to the extent it is awarded by an arbitrator or until the petition is abandoned. As used herein, the term "abandoned" refers to lack of prosecution of the arbitration by the mobilehome tenants' representative(s). An automatic arbitration based upon a more than 300% CPI increase will not require active tenant prosecution, although such prosecution will not be prohibited. The term "prosecution" refers to actively pursuing necessary steps toward preparing the tenants' case for the arbitration hearing.

(c) Contents of Petition.

(1) The Petition for Space Rent Review shall set forth the total number of affected rented spaces in the mobilehome park, shall identify the space occupied by each tenant and shall state the date upon which the notice of the rent increase was received by the tenant(s).

(2) After obtaining the required signatures, the tenant(s) shall deliver the petition or mail it by registered or certified mail to the Clerk at the following address: Community Development Commission, 1440 Guerneville Road, Santa Rosa, California 95403 (or other address as determined by the

Clerk). No petition shall be accepted unless it is accompanied by the requisite number of signatures and is received in the office of the Clerk within the twenty-one (21) day period set forth in subsection 19.14.006(b) above. The Clerk shall provide a copy of the completed petition form to both parties and the arbitrator forthwith or within five (5) working days of the petition's receipt.

(d) Information Questionnaire. After the Clerk has accepted a Petition For Space Rent Review, the Clerk shall remit to the owner and tenants an information questionnaire in such form as the Clerk may prescribe. The completed information questionnaire must be returned to the Clerk at least five (5) working days prior to the date scheduled for hearing of the petition by the arbitrator. Copies of the completed information questionnaire shall be provided to the arbitrator and the opposing party.

(e) Assignment of Arbitrator and Heating Date. Upon receipt of the petition, or in the event of an automatic arbitration, or upon an affected tenant's claim of a vacancy control violation where an unauthorized rent increase has been sought, the Clerk shall, within five (5) working days, assign an arbitrator. The Clerk shall set a date for the arbitration hearing no sooner than five (5) nor later than ten (10) working days after the arbitrator is assigned. The owner and affected tenant(s) shall be notified immediately in writing by the Clerk of the date, time, and place of the hearing and this notice shall be served either in person or by ordinary mail.

(f) Arbitration Hearing.

(1) The owner and tenant(s) may appear at the heating and offer oral and documentary evidence. Both the owner and tenant(s) may designate a representative or representatives to appear for them at the hearing. The arbitrator may grant or order one (1) continuance not to exceed five (5) days to each party from the date of the hearing. The burden of

proving that the mount of rent increase is reasonable shall be on the owner by a preponderance of the evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses. The rules of evidence and manner of producing evidence shall be those rules set forth in section 11513 of the California Government Code for the conduct of hearings under the Administrative Procedure Act. These rules may be relaxed at the discretion of the arbitrator in the interests of justice.

(2) The arbitrator shall, within fourteen (14) days of the heating, submit by mail a written statement of decision and the reasons for the decision to the Clerk who shall forthwith distribute by mail copies of the decision to the owner and tenant(s). The arbitrator shall determine the amount of rent increase, if any, which is reasonable based upon all the provisions of this chapter.

(3) Excluding rent increases permitted under section 19.14.004(a) and (b), the arbitrator shall not allow more than one (1) rent increase per park per twelve (12) month period.

(4) The decision of the arbitrator, rendered in accordance with this section, shall be final and binding upon the owner and all affected tenants. The decision of the arbitrator will be subject to the provision of Code of Civil Procedure section 1094.5.

(5) Any party may have electronic recording equipment or a court reporter present to record and prepare a transcript of the hearing before the arbitrator, however, such equipment or reporter shall be provided at that party's own expense.

(6) The arbitrator is authorized to modify the basic time periods set forth herein at his or her discretion to promote

the purposes of this program provided a final decision is rendered within ninety (90) days of the notice of rent increase.

(7) Any procedural or jurisdictional dispute regarding the processes set forth herein may be decided by the arbitrator.

(g) Tenant's and Owner's Right to Contact Clerk. The tenant and owner may contact the Clerk for an explanation of the provisions of this chapter.

19.14.007. RIGHTS OF A "TENANT-TO-BE".

Any person who is a "Tenant-to-be" as defined in Section 19.14.002(x) must be offered the option of renting a mobilehome space in a manner which will permit the "tenant-to-be" to receive the benefits of the Mobilehome Space Rent Stabilization Program described in this chapter, which includes, but is not limited to, rental of a mobilehome space on a month-to-month basis, and a new base rent as set forth in Section 19.14.150Co). Such a person cannot be denied the option of a tenancy twelve months or less in duration. The park owner shall provide each "tenant-to-be" with a written notification of the option which shall make the following recitation: "UNDER COTATI MUNICIPAL CODE SECTION 19.14.007 YOU ARE LEGALLY ENTITLED TO ELECT A MONTH-TO-MONTH TENANCY OVER ANY OTHER LONGER PERIODIC TENANCY. YOU ARE ADVISED THAT YOU MAY NOT BE ENTITLED TO RENT STABILIZATION (RENT CONTROL) PROGRAM BENEFITS IF YOU ELECT A LEASE OF MORE THAN TWELVE MONTHS IN DURATION IF THAT LEASE MEETS THE REQUIREMENTS OF CIVIL CODE SECTION 798.17 WHICH HAS BEEN ATTACHED HERETO." Any effort to circumvent the requirements of this section shall be unlawful, as well as an unfair business practice subject to enforcement under Business and Professions Code section 17200 et seq. The rights set forth above have no application to

mobilehome spaces subject to a more-than-twelve-month lease. By definition, tenants-to-be are prospective "mobilehome space tenants", and such tenants are defined by Section 19.14.002(m) as excluding "a party to a rental agreement exempt from regulation under this chapter pursuant to Civil Code Section 798.17." Within thirty (30) days after the mobilehome space rental agreement becomes effective, the owner shall provide a written statement, under penalty of perjury, to the Clerk attesting to the owner's compliance with this section 19.14.007 as to the person(s) renting said space and to all tenants-to-be with respect to said space. Said attestation shall also identify all persons to whom the notice described herein was provided.

19.14.008. SUBPOENA POWER.

Subpoenas, including subpoenas duces tecum, requiring a person to attend a particular time and place to testify as a witness, may be issued in connection with any dispute pending before an arbitrator, and shall be issued at the request of the Clerk, an arbitrator, the tenant(s) or the owner. Subpoenas shall be issued and attested by the Clerk of the City Council. A subpoena duces tecum shall be issued only upon the filing with the Clerk of the City Council of an affidavit showing good cause for the production of the matters of things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the proceedings, and stating that the witness has the desired matters or things in his or her possession or under his or her control, and a copy of such affidavit shall be served with the subpoena. Any subpoena or subpoena duces tecum issued pursuant to the provisions of this chapter may be served in person or by certified mail, return receipt requested, and must be served at least five (5) days before the hearing for which the attendance is sought. Service by certified mail shall be complete on the date of receipt. Any subpoena or subpoena duces tecum issued pursuant to the provisions of this chapter shall be deemed issued by and in the name of the City Council of the City of Cotati.

19.14.009. CONSOLIDATION OF PETITIONS.

As soon as possible after a petition has been filed with respect to mobilehome spaces which are within a single park, the Clerk shall, to the extent possible, consistent with the time limitations provided herein, consolidate petitions involving ten (10) or fewer affected tenants.

19.14.010. STANDARDS OF REVIEW.

In evaluating the space increase proposed or imposed by the owner, the following factors may be considered:

(a) Beneficial increases in maintenance and operating expenses, including but not limited to the reasonable value of the owner's labor and any increased costs for services provided by a public agency, public utility, or quasi-public agency or utility, provided, however, that any increased costs in rent stabilization administration fees shall be subject to the provisions of Section 19.14.004(b) and 19.14.070 heroin.

(b) The substantial rehabilitation or the addition of capital improvements, including the reasonable value of the owner's labor, as long as such rehabilitation or improvement has been completed and is:

(1) distinguished from ordinary repair or maintenance;

(2) for the primary benefit, use, and enjoyment of the tenants;

(3) of the property; permanently fixed in place or relatively immobile and dedicated to the use

(4) not coin-operated nor one for which a "use fee" or other charge is imposed on tenants for its use;

(5) cost-factored and amortized over the good faith estimate of the remaining useful life of the rehabilitation or improvement; and

(6) does not constitute maintenance of the infrastructure of gas or electrical lines within the mobilehome park for which the public utility has permitted the parkowner a special premium with the intent that it be used to replace or otherwise maintain the system within the mobilehome park.

(c) Increased costs of debt service due to a sale or involuntary refinancing of the park within twelve (12) months of the increase provided that:

(1) the sale or refinancing is found to have been an arm's length transaction;

(2) the proceeds of such refinancing is found to have been used for park improvements or similar park-related uses; and

(3) the aggregate amount from which total debt service costs arise constitutes no more than seventy percent (70%) of the value of the property as established by a lender's appraisal.

(d) The rental history of the space or the park of which it is a part, including:

(1) the presence or absence of past increases;

(2) the frequency of past rent increases; and

(3) the occupancy rate of the park in comparison to comparable parks in the same general area.

(e) The physical condition of the mobilehome space or park of which it is a part, including the quantity and quality of maintenance and repairs performed during the preceding twelve (12) months.

(f) Any increase or reduction of housing services since the last rent increase.

(g) Existing space rents for comparable spaces in comparable parks located in the City of Cotati.

(h) A decrease in "net operating income" as defined in Section 19.14.020(a).

(i) A fair return on the property prorated among the spaces of the park.

(j) Other financial information which the owner is willing to provide.

(k) Any costs incurred as a result of a natural disaster and only to the extent such costs have not been reimbursed to the owner by insurance or other sources.

19.14.020. NET OPERATING INCOME.

In evaluating a space rent increase imposed by an owner to maintain the owner's net operating income from the park, the following definitions and provisions shall apply:

(a) "Net Operating Income" of a mobilehome park means the gross income of the park less the operating expenses of the park.

(b) "Gross Income" means the sum of the following:

(1) gross space rents, computed as gross space rental income at 100% occupancy; plus

(2) other income generated as a result of the operation of the park, including, but not limited to, fees for services actually rendered; plus

(3) revenue received by the park owner from the sale of gas and electricity to park residents where such utilities are billed individually to the park residents by the park owner. This revenue shall equal the total cost of the utilities to the residents minus the amount paid by the park owner for such utilities to the utility provider; minus

(4) uncollected space rents due to vacancy and bad debts to the extent that the same are beyond the park owner's control. Uncollected space rents in excess of three percent (3%) of gross space rent shall be presumed to be unreasonable unless established otherwise and shall not be included in computing gross income. Where uncollected space rents must be estimated. the average of the preceding three (3) years experience shall be used.

(c) "Operating Expenses" means:

(1) Real property taxes and assessments.

(2) Utility costs to the extent that they are included in space rent.

(3) Management expenses including the compensation of administrative personnel, including the value of any mobilehome space offered as part of compensation for such services, reasonable and necessary advertising to ensure occupancy only, legal and accounting services as permitted herein, and other managerial expenses. Management expenses are presumed to be not more than five percent (5%) of gross income, unless established otherwise.

(4) Normal repair and maintenance expenses for the grounds and common facilities including but not limited to landscaping, cleaning, and repair of equipment and facilities.

(5) Owner-performed labor in operating or maintaining the park. In addition to the management expenses listed above, where the owner performs managerial or maintenance services which are uncompensated, the owner may include the reasonable value of such services. Owner-performed labor shall be limited to five percent (5%) of gross income unless the arbitrator finds that such a limitation would be substantially unfair in a given case. A park owner must devote substantially all of his or her time, that is, at least forty (40) hours per week, to performing such managerial or

maintenance services in order to warrant the full five percent (5%) credit of his or her labor as an operating expense. No credit for such services shall be authorized unless a park owner documents the hours utilized in performing such services and the nature of the services provided.

(6) Operating supplies such as janitorial supplies, gardening supplies, stationery, and so forth.

(7) Insurance premiums prorated over the life of the policy.

(8) Other taxes, fees, and permits, except as provided in Section 19.14.070 herein.

(9) Reserves for replacement of long-term improvements or facilities, provided that accumulated reserves shall not exceed five percent (5%) of Gross Income.

(10) Capital improvement costs exceeding existing reserves for replacement.

Expenditures for capital improvements to upgrade existing facilities shall be an allowable operating expense only if the park owner has:

(i) Established upon written verification, or by other competent evidence to the satisfaction of the arbitrator, that the cost of the capital improvements provided to the park tenants, for their general use; are factually correct as claimed.

(ii) Said capital improvements are wholly compensable to the park owner upon appropriate amortization of their cost, together with a reasonable return upon the capital improvement investment made by the park owner.

(iii) Any capital improvement expenses shall be amortized over the reasonable life of the improvement or such other period as may be deemed reasonable by the arbitrator under the circumstances. In the event that the capital improvement expenditure is necessitated as a result of an accident, disaster, or other event for which the park owner received insurance benefits, only those capital improvement costs otherwise allowable exceeding the insurance benefits may be calculated as operating expenses.

(11) Involuntary refinancing of mortgage or debt principal. A park owner may, under the provisions of this subsection, be able to include certain debt service costs as an operating expense. Such costs are limited to increases in interest payments from those interest payments made during 1998 or the first year such payments were made if the owner acquired the park after 1998 which result from one or the following situations or the equivalent thereof:

(i) refinancing of the outstanding principal owed for the acquisition of a park where such refinancing is mandated by the terms of a financing transaction entered into prior to January l, 1999, for instance, termination of a loan with a balloon payment; or

(ii) increased interest costs incurred as a result of a variable interest rate loan used to finance the acquisition of the park and entered into prior to January 1, 1999.

In refinancing, increased interest shall be permitted to be considered as an operating expense only where the park owner

can show that the terms of the refinancing were reasonable and consistent with prudent business practices under the circumstances.

(d) Operating expenses Shall not include the following:

(1) Debt service expenses, except as provided in subsection (c) (11), above.

(2) Depreciation.

(3) Any expense for which the park owner is reimbursed.

(4) Attorneys' fees and costs, except printing costs and documentation as required by Section 19.14.005 only, incurred in proceedings before an arbitrator or in connection with legal proceedings challenging the decision of an arbitrator or the validity or applicability of this chapter.

(e) All operating expenses must be reasonable. Whenever a particular expense exceeds the normal industry or other comparable standard, the park owner shall bear the burden of proving the reasonableness of the expense. To the extent that an arbitrator finds any such expense to be unreasonable, the arbitrator shall adjust the expense to reflect the normal industry or other comparable standard.

(f) In determining whether an owner's net operating income has been maintained, the owner's net operating income in the base year shall be the net operating income which is to be maintained and against which future years' net operating income shall be compared.

(g) To the extent that any rent increase granted by an arbitrator or noticed by an owner is based upon maintaining the owner's net operating income, said increase may be charged to the tenants only for the twelve months immediately following the effective date of the notice of said rent increase.

19.14.030. OBLIGATIONS OF THE PARTIES.

(a) If a final decision by an arbitrator finds that a proposed increase or any portion thereof that was previously inoperative is justified, the tenant shall pay the amount found justified to the owner within thirty (30) days after the decision is made or as otherwise ordered by the arbitrator.

(b) If a final decision by an arbitrator finds that an increase or any portion thereof is not justified, the owner shall refund any amount found to be unjustified, but that had been paid, to the tenant within thirty (30) days after the decision is made or as otherwise ordered by the arbitrator. If such refund is not made within the applicable time period, the tenant may withhold the amount from the next space rent(s) due until the full amount of the refund has been made. Notwithstanding the foregoing, in the event that the tenancy of tenant is terminated for any reason prior to full credit against rent, the balance of the credit due the tenant shall be paid by the owner within thirty (30) days from the date of the termination of the tenancy.

(c) Any sum of money that under the provisions of this section is the obligation of the owner or tenant, as the case may be, shall constitute a debt and, subject to the foregoing provisions of this section, may be collected in any manner provided by law for the collection of debts.

19.14.040. TENANTS RIGHT OF REFUSAL.

A tenant may refuse to pay any increase in rent which is in violation of this chapter, provided a petition has been filed and either no final decision has been reached by an arbitrator or the increase has been determined to violate the provisions of this chapter. Such refusal to pay shall be a defense in any action brought to recover possession of a mobilehome space or to collect the rent increase.

19.14.050. RETALIATORY ACTS: TENANTS' RIGHT TO ORGANIZE.

No owner may retaliate against a tenant or tenant-to-be for the tenant's or tenant-to-be's assertion or exercise of rights under this chapter in any manner, including but not limited to, threatening to bring or bringing an action to recover possession of a mobilehome space; engaging in any form of harassment that causes a tenant to quit the premises; dissuades a tenant-to-be from freely exercising his or her legal options to chose a month-to-month rental; decreasing housing services; increasing the space rent; or imposing or increasing a security deposit or any other Charge payable by a tenant. The tenants have a right to organize a tenant's association without hindrance from the park owner to exercise the rights provided under the provisions of the City of Cotati Municipal Code. This association may be referred to as "the Park Tenant's Association at (Park Name)".

19.14.060. SOLICITATION OF ANY PETITIONS BY THE PARK OWNERS ARE WITHOUT FORCE OR LEGAL EFFECT WITHIN CITY'S PROGRAM.

The distribution of a petition or other documents seeking to have mobilehome tenants waive rights, abandon a filed petition or in any way affect the entitlement of the tenants to participate in the rent stabilization process authorized under this chapter shall be without force or legal effect within the City's rent stabilization program. Such documents shall not affect the right of any tenant to participate in the rights, remedies, procedures and processes set forth in this chapter. Efforts to utilize such documents to discourage participation in the City's rent stabilization program may be deemed retaliatory.

19.14.070. FEES.

The costs of administration of this chapter shall be borne by the City of Cotati; subject to reimbursement by imposition of a rent stabilization administration fee chargeable against each mobilehome space in the City and payable by each park owner. The park owner who pays these fees may pass through 50% of the fees assessed against a mobilehome space to the tenant only as set forth herein. This fee pass through must take place no later than twelve months after the park owner is billed for the program administration fees. At the owner's option, said fee pass through shall be invoiced in (a) twelve equal, monthly installments or (b) four equal, quarterly installments. Failure to timely pass through 50% of the fees assessed against a mobilehome space will result in the loss of the park owner's fight to do so. The remaining 50% of the fees assessed against a mobilehome space shall not be passed on in any way to tenants. Fees passed through to tenants as herein authorized shall not be considered a part of the rent base upon which future rent increases can be made.

The fees imposed by this section shall be paid annually. The time and manner of payment, delinquency status, and assessment and collection of penalties for delinquent payment of the fees imposed by this section shall be as provided by separate ordinance of the City Council. The Clerk shall recommend to the City of Cotaft from time to time the amount of such fee and the City Council shall adopt such fee by ordinance or resolution.

19.14.080. EXEMPTION FROM FEES.

Any park owner who believes that he/she may be entitled to a space fee exemption pursuant to Civil Code section 798.17(o), having provided the park tenant with a legally recognized long-term lease which is not subject to rent stabilization administration fees, shall provide the Clerk with the following documentation:

1.) the executed lease for each exempt space claimed;

2.) amendments to said exempt lease, if any;

3.) for a newly constructed space, proof that the space was constructed after November 3, 1998 (building permits, etc.); and

4.) evidence that the owner complied with sections 19.14.005 and 19.14.007.

19.14.090. NONWAIVERABILITY.

Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this chapter is waived or modified, is against public policy and void, except with respect to any rental agreement complying with all of the terms and conditions set forth in section 798.17 of the California Civil Code.

19.14.110. PENALTIES AND REMEDIES.

In addition to those penalties and remedies set forth elsewhere in this chapter, the following remedies shall apply:

Any owner who demands accepts, receives, or retains any money as rent from a tenant to which the owner is not entitled under the provisions of this chapter shall be liable to the tenant for any actual damages, attorney's fees, and costs incurred by the tenant as a consequence thereof plus a penalty in the sum of three times the amount of money the owner accepted, received, or retained in violation of the provisions of this chapter or $500.00, whichever is greater.

19.14.120. RIGHTS OF AFFECTED TENANTS RESERVED.

This chapter shall not be construed to limit or curtail any other action or proceeding which may be pursued by an affected tenant against an owner before any court or other body having jurisdiction thereof.

19.14.121. TENANT COMPLAINTS.

Any tenant or tenant-to-be may file a complaint with the Clerk for the purpose of contesting any rent increase and/or to enforce any provision of this chapter. Prior to and as a condition to said filing, the tenant and/or tenant-to-be must meet and confer with the owner to attempt to informally resolve their differences. The owner shall make him/herself available for said meeting and conferring within a reasonable time after being requested to do so by the tenant and/or tenant-to-be, but no later than 30 days thereafter. If applicable, the owner shall comply with Section 19.14.006(a)(2), above. If such informal resolution cannot be had, then the tenant and/or tenant-to-be (hereinafter collectively referred to as "complainant") may file with the Clerk (and contemporaneously deliver a copy to the owner) his/her complaint. All such complaints shall describe in detail the basis therefor and shall attach, where available and necessary to a full understanding of the complaint, documents and writings which support the complaint. Upon receiving such a complaint, the Clerk shall assign an arbitrator to the matter in accordance with Section 19.14.006(e) and the matter shall be arbitrated in conformance with Section 19. 1 4.006. As to a complaint which challenges a rent increase, the burden shall be on the owner to prove the validity of the increase by a preponderance of the evidence. As to a complaint which seeks to enforce any provision of this chapter not involving an increase in rent, the complainant shall have the burden of proof by a preponderance of the evidence, unless said complaint seeks to enforce an obligation which is expressly imposed upon the owner, in which case the burden of proof shall be - the owner's, by a preponderance of the evidence.

19.14. 130. REVIEW BY THE CITY COUNCIL.

The City Council shall review the effectiveness of this chapter in addressing the problems giving rise to its enactment at least one (1) year from its enactment. Notice of the time and

place of the City Council's review shall be published at least ten (10) days prior to said date in a newspaper of general circulation in the City of Cotati.

19.14.140. SEVERABILITY.

The chapter enacting this chapter shall be liberally construed to achieve its purposes and preserve its validity. If any provision or clause of said chapter or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of said chapter which can be given effect without the invalid provision or application,. and to this end the provisions of said chapter are declared to be severable and are intended to have independent validity.

19.14.150. VACANCY CONTROL AND DE-CONTROL - ESTABLISHMENT OF NEW BASE RENT.

(a) Except as otherwise provided in this Sec. 19.14.150, a mobile home park owner shall not charge a new basement or increase the rent for a mobile home space because that space has become vacant or the tenancy with respect to that space has terminated. A mobilehome park owner shall be permitted to charge a new base rent for a mobilehome space whenever a lawful space vacancy occurs. For purposes ofthis chapter, a lawful space vacancy is defined as follows:

(1) A vacancy of the mobilehome space occurring because of the termination of the tenancy of the affected mobilehome tenant in accordance with the Mobilehome Residency Law, California Civil Code sections 798.55 through 798.60, as amended; or

(2) A vacancy of the mobilehome space arising from the voluntary removal of a mobilehome from the mobilehome space by the affected mobilehome tenant. A removal of the mobilehome from the space for the purpose of

performing rehabilitation or capital improvements to the space or for the purpose of upgrading the mobilehome or purchasing a new, substitute mobilehome for occupancy by the same tenant shall not constitute a voluntary removal of the mobilehome. A removal of the mobilehome from the space for the purpose of performing repair and/or improvement to the space and/or for the purpose of repairing, maintaining or replacing the mobilehome due to the damage thereof shall not constitute a voluntary removal of the mobilehome.

(b) When a new base rent is established following the vacancy of a mobilehome space pursuant to this subsection, the park owner shall give written notice to the new affected mobilehome tenant of the twelve (12) month anniversary date for rent increases allowed under Section 19.14.004 and shall give written notice to such affected tenant that the space rent may subject to stabilized rent increases pursuant to the provisions of this chapter.

(c) In the absence of a lawful vacancy of the mobilehome space, a park owner is prohibited from raising rent upon a sale of a mobilehome on site to a tenant-to-be or current tenant.

SECTION II. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portion of this ordinance. The City Council hereby declares that it would have passed this ordinance and every section, subsection, sentence, clause or phrase thereof, irrespective of the fact any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional or invalid.

SECTION III. If an injunction or any other administrative or judicial challenge interferes with the timely implementation of this ordinance the City Council hereby ordains that Sections 19.12.010 through 19.12.130 of the Cotati Municipal

Code, as those sections appear and exist on the date this ordinance is adopted, shall be re-enacted and shall continue in effect only as to mobilehome parks and mobilehome spaces until said challenge is overcome as is determined by the City Council. This action is undertaken so that at least the existing and current level of rent stabilization protection established pursuant to said Sections 19.12.010 through 19.12.130 shall continue to be provided to the affected mobilehome park tenants of the City until further action of the City Council.

SECTION IV. This ordinance shall become effective only if the Rent Stabilization ordinance adopted by initiative in 1979 and currently codified in the Cotati Municipal Code at sections 19.12.010 through 19.12.130 is repealed by the passage of City of Cotati Measure F which is on the ballot for the November 3, 1998, municipal election. In the event that said Rent Stabilization ordinance is so repealed, then this Ordinance No. 680 shall become effective (a) thirty days after Ordinance No. 680's adoption by the City Council, or (o) at the time that the repeal of said Rent Stabilization Ordinance becomes effective, whichever is later.

SECTION V. Posting. The City Clerk shall cause this ordinance to be published and/or posted within fifteen days after its adoption.

* * * * * * * * * *

This ordinance was introduced on the 9th day of September, 1998, and adopted on the 23rd day of September, 1998, by the following vote, to wit:

CULLINEN	Yes
BERKEMEIER	Yes
DELL'OSSO	Yes

ELLES Yes

JENSEN Yes

APPROVED /s/ Richard M. Cullinen, Jr.
Mayor

ATTEST /s/_____
Deputy City Clerk

FILED
JAN 14 2006

No. 05-676

In The
Supreme Court of the United States

GENE CASHMAN and EUGENIA GUINN,

Petitioners,

v.

CITY OF COTATI, a Municipal Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Ninth Circuit correctly hold that this Court's decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. ___, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), barred Petitioners' claim that a mobilehome rent control ordinance effected a facial regulatory taking because it did not substantially advance a legitimate public purpose?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Cotati ("City") respectfully requests that this Court deny Petitioners Gene Cashman and Eugenia Guinns' ("Parkowners") Petition for Writ of Certiorari ("Petition") seeking review of the United States Court of Appeal decision in this case.

OPINIONS BELOW

The District Court's Findings Of Fact And Conclusions of Law following a bench trial is unpublished, but can be found at 2000 U.S. Dist. LEXIS 26987. The Ninth Circuit opinion before rehearing is published at 374 F. 3d 887 (9th Cir. 2004). The Ninth Circuit's Order granting rehearing, withdrawing its prior opinion, *supra*, and affirming the District Court's judgment in favor of City is published at 415 F. 3d 1027 (9th Cir. 2005).

JURISDICTION

The Ninth Circuit Order granting rehearing and affirming judgment in City's favor was filed July 15, 2005. Parkowners' petition for rehearing of that Order was denied August 25, 2005. The Petition herein was timely filed on November 22, 2005 in accordance with Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

California Civil Code section 798.56 states the reasons that permit a mobilehome parkowner's termination of a park resident's tenancy. *See* Pet. App. I. Civil Code section 798.73 permits a mobilehome owner to sell his home in the park with certain restrictions. *See* Pet. App. I. Civil Code section 798.74 gives parkowners the right to approve buyers of homes in their parks. *See* Pet. App. K.

The text of City's Ordinance No. 680 is set out at Petition Appendix L.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. In 1979, the City enacts by initiative a rent stabilization ordinance which regulates all rental property, including mobilehome parks.

The Ordinance at issue herein was preceded by an earlier ordinance enacted pursuant to a 1979 voter initiative. *See* Pet. App. L-3, Ord. § 19.14.001(a). That earlier ordinance regulated rents charged by owners of all residential property in the City including mobilehome parks. *Id.* One of that ordinance's stated purposes was the preservation of an affordable stock of residential rental units

in the City. *See 152 Valparaiso Associates v. City of Cotati*, 56 Cal. App. 4th 378, 380 (1997).

After enactment of the earlier ordinance, a group of property owners sued the City in California state court alleging that it had caused an unconstitutional taking of their property. *See 152 Valparaiso Associates, supra*, 56 Cal. App. 4th at 381. The property owners alleged that the ordinance as applied had failed to substantially further one of its stated purposes – the preservation of affordable housing – and had denied them a fair return on their investment. *Id.* The trial court sustained a demurrer to the complaint and dismissed it. *Id.* On appeal, the California State Court of Appeal reversed. *Id.* at 388. It held that, assuming the truth of the complaint's allegations, the property owners were entitled to a trial.

After the decision in *152 Valparaiso Associates*, City entered into a settlement agreement with the plaintiff property owners. *See* Pet. App. L-3. Pursuant to that agreement, City agreed to place on the November 3, 1998 ballot, a proposal to repeal the prior ordinance which regulated all rental property. *Id.*

2. In 1988, City enacts Ordinance No. 680 to continue to protect mobilehome park residents from excessive rents in the event the electorate voted to repeal the 1979 general rent control ordinance.

In September 1998, City had determined that should its general rent stabilization ordinance be repealed at the polls, there was still a need to continue rent stabilization in mobilehome parks. *See* Pet. App. L-3, Ord. §§ 19.14.001(c) and (d). City reached this conclusion through a number of

factual findings, including: an extremely low vacancy rate in mobilehome parks coupled with rent increases that were significantly outpacing increases in the Consumer Price Index ("CPI"); demographic data indicating mobilehome park residents tended to be elderly persons on fixed and relatively low income; and, disparate bargaining power between the residents and parkowners. *Id.* at L-3 and L-4, Ord. §§ 19.14.001(c) and (d).

On September 9, 1998, the City therefore adopted Ordinance No. 680, which was to go into effect should the general ordinance be repealed. The new Ordinance's purposes, inter alia, were to protect mobilehome park residents from excessive space rents, while guaranteeing parkowners a fair, just and reasonable return. *See* Pet. App L-6, Ord. § 19.14.001(d).

Section 19.14.001(c)(14) makes it clear that the Ordinance was to continue in effect the "vacancy control"[1] imposed under its predecessor ordinance since 1979. *See* Pet. App. L-5. In November 1998, the voters endorsed the proposal to repeal the predecessor ordinance and Ordinance No. 680 went into effect.

---

[1] The term "vacancy control" refers to the Ordinance's restriction on rent increases when a mobilehome is sold or transferred in place. The term originally arose in the context of apartment rent control. It is a bit of a misnomer in the context of mobilehome rent control where although a resident may "vacate" the park, his home generally is sold in place and remains in the park.

3. Section 19.14.004 of Ordinance No. 680 permits annual rent increases pursuant to administrative application.

Ordinance section 19.14.004 permits parkowners to raise rents annually by the lesser of the CPI increase or six percent. Parkowners may also pass on to the residents fifty-percent of the administrative fees they incur under the Ordinance. *See* Pet. App. L-12, L-13, and L-33, Ord. §§ 19.14.004(b) and 19.14.070.

If a parkowner wants a rent increase greater than that permitted by section 19.14.004(a), but not greater than 300 percent of the CPI increase, he may seek one by serving affected residents with notice of the rent increase and supporting data. *See* Pet. App. L-15, Ord. 19.14.005(b). The parkowner and the residents must then meet and confer in an attempt to reach agreement. *Id.* at L-17 and L-18, Ord. § 19.14.006(a). If they cannot reach agreement, at least 51 percent of the affected residents may petition the City to review the proposed increase. *Id.* at L-19, Ord. § 19.14.006(b).

Thereafter, an arbitrator conducts an evidentiary hearing, receives evidence, and determines the amount of any rent increase. *See* Pet. App. L-20 and L-21, Ord. § 19.14.006(f). In reaching his decision, the arbitrator may consider a host of financial data relating to park operation. *Id.* at L-24 through L-30, Ord. §§ 19.14.010 and 19.14.020. The arbitrator's decision is final; it is subject to judicial review pursuant to California Civil Procedure Code section 1094.5. *Id.* at L-21, Ord. § 19.14.006(f)(4).

If a parkowner wishes to increase rent by more than 300 percent of the CPI increase, the arbitration process automatically is invoked. *See* Pet. App. L-16 and L-17, Ord. § 19.14.005(b)(6).

4. Section 19.14.150 of Ordinance No. 680 generally permits rent increases upon vacancy of the space, but not upon transfer or sale of a mobilehome that remains on its space.

Section 19.14.150 of the Ordinance permits a parkowner to establish a new base rent for spaces that become vacant pursuant to termination of tenancy under California Civil Code sections 798.55 through 798.60, or where a resident voluntarily and permanently removes the home from the space, without intending to place another home in its place. *See* Pet. App. L-36 and L-37. A parkowner may not otherwise raise rent simply because a resident has sold his home in place to a new buyer. The effect of this provision is commonly referred to as "vacancy control."

B. PROCEDURAL BACKGROUND

On July 29, 1999, Parkowners filed their Complaint seeking declaratory and injunctive relief and money damages. *See* Pet. App. LD-1. Parkowners alleged City's Ordinance effected a facial regulatory taking because: the Ordinance's vacancy control provision prevented Parkowners from raising rents to market level upon the sale or transfer of a mobilehome; the seller of a mobilehome theoretically would be able to sell his home for a premium because of the below-market rent; and, the Ordinance therefore would not fulfill an **unstated**[2] purpose of preserving affordable housing. The Complaint made no allegations

[2] The Ordinance has seven stated purposes – none of which includes a purpose of preserving affordable housing. *See* Pet. App. L-6, Ord. § 19.14.001(d).

whether the Ordinance would fail to substantially advance any of its stated purposes.

On January 25, 2000, the District Court dismissed Parkowners' damages claims as unripe. *See* Pet. App. D-1.

On March 31, 2000, Parkowners filed a motion for summary judgment. Parkowners adduced no evidence in support of their motion. Instead, Parkowners merely argued that the Ordinance would presumptively create a premium and therefore was invalid as a matter of law pursuant to the Ninth Circuit decision in *Richardson v. City and County of Honolulu* ("*Richardson*"), 124 F. 3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998), because the presumptive premium would prevent the Ordinance from substantially advancing an unstated purpose of preserving affordable housing.

On April 21, 2000, City filed its Opposition to the summary judgment motion. City argued: (1) Parkowners had failed to adduce any evidence that the Ordinance would produce any premium of any magnitude; (2) the Ordinance had no stated purpose of preserving affordable housing; (3) Parkowners completely failed to address whether the Ordinance would further its seven stated purposes; and, (4) Parkowners' facial claim was barred by the one-year statute of limitations because the Ordinance continued in force the same vacancy control as its predecessor rent control ordinance enacted in 1979. City also filed opposing Declarations of Ken Baar, Stephen D. Lewis, and Jeffrey A. Walter. *See* Pet. App. F-30 and F-31.

Mr. Walter had been Cotati's City Attorney since 1980. His declaration adduced facts showing that Parkowners' facial claims were time-barred because Parkowners had

continuously been subject to rent control, including vacancy control, since 1979.

Dr. Lewis' declaration adduced evidence that: he had conducted analyses, including a regression analysis, of 1700 mobilehome sales in Sonoma County from 1987-89; and, his analyses concluded that City's Ordinance was not adding any premium to mobilehome resale prices. *See* Pet. App. F-30.

Dr. Baar's declaration adduced evidence of a study he had done for the City of Montclair. His study concluded that even if vacancy control were to add a premium to mobilehome resale prices under Montclair's mobilehome rent control ordinance, mobilehomes would still be more affordable with vacancy control than without it. *See* Pet. App. F-31.

On June 21, 2000, the Court granted Parkowners' summary judgment motion. *See* Pet. App. D-1. The Court noted that Parkowners had adduced no evidence in support of their motion (*see* Pet. App. H-14), but as it later noted in its subsequent Order stating its inclination to vacate the judgment, it felt that this Court's holding in *Richardson*, *supra*, compelled invalidation of the Ordinance as a matter of law, without any factual analysis. For that reason, the Court ignored City's proffered evidence in the Declarations of Lewis and Baar. *See* Pet. App. H-17. The Court disregarded City's statute of limitations defense on the grounds the challenged Ordinance was a different ordinance from the predecessor ordinance. *Id.* at H-9. The Court failed to address the fact that Parkowners' contentions as to the effects of vacancy control were the same under both ordinances. The Court also failed to address the facts that: the Ordinance had no stated purpose of

preserving affordable housing; and, Parkowners had failed to address the Ordinance's seven stated purposes. On June 21, 2000, the Court entered its Judgment declaring the Ordinance invalid. *Id* at 70.

On July 3, 2000, City filed a Motion to Amend or Alter the Judgment. In it City argued, inter alia, that the Court should not have declared the entire Ordinance invalid; instead, the Court at most should have invalidated only the challenged vacancy control provisions. The Court granted City's motion on August 25, 2000 and entered an Amended Judgment declaring only section 19.14.150 of the Ordinance to be void. *See* Pet. App. F-6.

On September 13, 2000, the Ninth Circuit issued its decision in *Chevron U.S.A., Inc. v. Cayetano* ("*Chevron*"), 224 F. 3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001). There, the Court addressed the contention that an ordinance's rent increase restrictions on gasoline station franchises would cause higher gasoline prices and thus frustrate the ordinance's purpose of ameliorating rising gasoline prices. The Court clarified its holding in *Richardson*, *supra*, noting that the mere possibility that an ordinance might produce a price increase or premium was not sufficient to constitute a taking. Instead the plaintiff had the burden of proving as a matter of predictive fact that the challenged ordinance would produce a premium that would prevent it from substantially advancing a legitimate government purpose.

On or about September 19, 2000, City filed a Notice of Appeal from the Amended Judgment; Parkowners filed their Notice of Cross-Appeal on October 4, 2000.

On November 16, 2000, City filed a Motion for Memorandum Opinion Stating Inclination To Grant Relief From

Amended Judgment Pursuant To F.R.C.P. Rule 60. In it City argued that in light of the Ninth Circuit's decision in *Chevron*, *supra*, the District Court had erred in granting summary judgment as a matter of law. *Id.* On January 18, 2001, the District Court filed its Memorandum Decision and Order granting City's Motion. *See* Pet. App. D-2.

On February 28, 2001, the Ninth Circuit remanded the appeal to provide the District Court an opportunity to vacate its Amended Judgment. *See* Pet. App. D-2. The District Court filed its Order on March 7, 2001, vacating its Amended Judgment. On April 13, 2001, the Ninth Circuit dismissed the appeal and cross-appeal as moot. *See* Pet. App. F-7.

The District Court thereafter set the matter for trial. On September 10, 2002, following a bench trial, the District Court filed its Findings Of Fact And Conclusions Of Law. *See* Pet. App. D. The Court found the following facts: (1) The Ordinance did not create, nor was it likely to create, a premium in mobilehome resale prices; (2) the Ordinance did not inhibit, nor was it likely to inhibit, the sales of mobilehomes or the construction of new mobilehome parks; (3) the Ordinance substantially advanced its stated purposes; (4) the Ordinance did not affect, nor was it likely to adversely affect, the existence of affordable housing in Cotati; and, (5) Cotati had enforced its predecessor rent control ordinance consistent with the understanding that it provided for vacancy control. *Id.* at D-2 through D-26.

The Court additionally made the following conclusions of law: (1) The Ordinance's stated purposes are legitimate government interests; (2) the Ordinance has the additional unstated legitimate government purpose of preserving

affordable housing; (3) Parkowners failed to establish that the Ordinance fails to substantially advance legitimate government interests; (4) the Ordinance does not violate the Fifth and Fourteenth Amendments to the United States Constitution because it does not constitute a facial regulatory taking; and, (5) Parkowners' facial challenge is barred by the statute of limitations. *Id.* at D-26 through D-33

The Court filed Judgment in City's favor on September 10, 2002, and Parkowners appealed.

On July 15, 2004, the Ninth Circuit issued its initial opinion. Pet. App. F-1. In it, a two-justice majority panel reversed. The panel reinstated the original summary judgment in favor of Parkowners holding that as a matter of law the Ordinance presumptively created a premium (even though factually it did not), which premium presumptively prevented the Ordinance from substantially furthering City's interests, "including that of affordable housing." *See* Pet. App. F-22. The panel could not and did not explain how the mythical premium prevented the Ordinance from substantially furthering its seven stated purposes which were unrelated to preserving affordability of homes as to future residents.

City filed a timely Petition For Panel Rehearing And Rehearing En Banc. After City filed its petition, this Court granted certiorari in *Lingle v. Chevron U.S.A., Inc.* ("*Lingle*"), 544 U.S. ___, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). There, the Court held that an ordinance's failure to substantially advance a legitimate public purpose was not part of our takings jurisprudence. Based on *Lingle*, the Ninth Circuit vacated its initial decision and affirmed the District Court's judgment in City's favor. Pet. App. B-1.

REASONS WHY THE PETITION SHOULD BE DENIED

Parkowners fail to offer any of the reasons listed in Supreme Court Rule 10 that would merit the granting of its petition. The Ninth Circuit's decision does not conflict with the decisions of any other circuit or state court of the last resort.

Contrary to Parkowners' suggestion in their "Questions Presented," this Court in *Lingle* did not hold that a "'substantially advances a legitimate state interest' test . . . is limited to a due process claim." *See* Petition at I. Instead, this Court iterated that government action can be found impermissible where it "is so arbitrary as to violate due process. . . ." *Lingle*, *supra*, 161 L. Ed. 2d at 28. This Court previously has held that rent control does not violate due process because it is rationally related to the legitimate government purpose of "protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell v. City of San Jose* ("*Pennell*"), 485 U.S. 1, 13 (1988). The Ninth Circuit is in accord. *See Levald, Inc. v. City of Palm Desert* ("*Levald*"), 998 F. 2d 680, 690 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994).

Here, Parkowners were not prevented by Ninth Circuit precedent from alleging a due process claim; they simply could not do so on the merits because City's Ordinance is rationally related to a legitimate government purpose. Moreover, City in any event met a much higher standard by proving at trial that the Ordinance substantially advanced a number of legitimate government purposes. Petitioners do not urge any error in that trial. The correction of any such

error would in any event be beyond the paramount roles of this Court.

The Court should also reject Parkowners' implicit suggestion that it overturn *Pennell* and *Lingle*, *supra*, and apply the heightened scrutiny of *Nollan v. California Coastal Comm'n* ("*Nollan*"), 483 U.S. 825 (1987). In *Nollan*, the Court noted that because of the potential dangers of a disguised physical taking, the conditioning of a land use permit on the exaction of an easement should be subjected to a higher level of means-ends scrutiny. In *Lingle*, however, the Court correctly noted the dangers of extending such heightened scrutiny to rent control and other land use restrictions:

> The [substantially advances] formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited. Moreover, it would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

161 L. Ed. 2d at 892.

I.

CERTIORARI IS NOT MERITED UNDER RULES OF THE SUPREME COURT, RULE 10

Supreme Court Rule 10 emphasizes that certiorari "will be granted only for compelling reasons" and states non-exhaustive circumstances under which certiorari

might be appropriate. Parkowners allege no such circumstance here; nor do they offer any compelling reason for granting certiorari.

At trial, City successfully defeated on the merits Parkowners' claim that the Ordinance failed to substantially advance any legitimate public purpose. This Court's decision in *Lingle* simply confirmed that not only did Parkowners' contention lack factual merit, but it also lacked any legal merit.

II.

PARKOWNERS DO NOT HAVE A VIABLE SUBSTANTIVE DUE PROCESS CLAIM

Parkowners request that they be allowed to belatedly assert a substantive due process claim based on their allegation the Ordinance substantially fails to advance any legitimate government purpose. This request makes no sense. First, contrary to Parkowners' contention (Pet. at 14), this Court did not approve a "substantially advances" substantive due process test in *Lingle*. To the contrary, the Court affirmed that substantive due process requires only a rational (non-arbitrary) relationship to a legitimate public purpose. *Lingle*, *supra*, 161 L. Ed. 2d at 891 and 882 ("[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulations"). On its face, the Ordinance does not violate due process because it is rationally related to the legitimate government purpose of "protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell*, *supra*, 485 U.S. at 13. The Ninth Circuit agrees. *See Levald*, *supra*, 998 F. 2d at 690.

Second, City in any event factually disproved at trial Parkowners' contention that the Ordinance failed to substantially advance any legitimate government purpose.

III.

PARKOWNERS DO NOT HAVE A VIABLE TAKINGS CLAIM UNDER *NOLLAN*

Parkowners argue that their failure-to-substantially-advance takings claim should be analyzed under *Nollan*, not *Lingle*. Parkowners' argument is meritless. The allegations here are identical to those in *Lingle*: a rent control ordinance that allegedly will not accomplish its purposes. This is not a case, as in *Nollan*, wherein the City exacted any physical dedication of property.

In *Nollan*, the California Coastal Commission conditioned the development of beachfront property on the dedication of a public easement across it. It was this exaction of an easement, which constituted a physical taking, that prompted this Court to impose the heightened scrutiny of the "substantially advances" test:

> We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement rather than the state police power objection.

Nollan, supra, 483 U.S. at 841.

Parkowners' challenge herein to City's Ordinance is virtually indistinguishable from the challenge to the Hawaiian Act in *Lingle*. Both challenges asserted that rent

control restrictions effected facial regulatory takings because they did not substantially advance a legitimate purpose. Both challenges concerned themselves not with the impact of the restrictions on the regulated property, but instead focused solely on whether the restrictions would achieve their goals. As this Court therefore noted in *Lingle*, *supra*, 161 L. Ed. 2d at 893-94:

> Although *Nollan* and *Dolan* quoted *Agins'* language, see *Dolan*, *supra*, 512 U.S. at 385, 129 L. Ed. 2d 304, 114 S. Ct. 2309; *Nollan*, *supra*, 483 U.S. at 834, 97 L. Ed. 2d 677, 107 S. Ct. 3141, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. See *Dollan*, *supra*, 512 U.S. at 387-388, 129 L. Ed. 2d 304, 114 S. Ct. 2309; *Nollan*, *supra*, 483 U.S. at 841, 97 L. Ed. 2d 677, 107 S. Ct. 3141. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taking for a public use – in exchange for a discretionary benefit

> conferred by the government where the benefit has little or no relationship to the property." 512 U.S. at 385, 129 L. Ed. 2d 304, 114 S. Ct. 2309. That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

In short, *Lingle* made it clear that the *Nollan* test has no application in a rate-setting case like this one.

IV.

THE COURT SHOULD NOT EXPAND APPLICATION OF THE HEIGHTENED SCRUTINY OF *NOLLAN* BEYOND THOSE CASES INVOLVING PHYSICAL EXACTIONS

In *Lingle*, the Court found it "remarkable, to say the least," (161 L. Ed. 2d at 892) that a District Court Judge could put a legislative act on trial, receive evidence on whether it would achieve its purposes, and then substitute his opinion for that of the legislature as to whether the act was efficacious. The situation in this case is even more remarkable.

Here, City prevailed after trial, proving that the Ordinance: never had produced any so-called premium and was unlikely to do so in the future (*see* Pet. App. D-10, ¶ 13); and, the Ordinance substantially advanced its stated legitimate government purposes. *Id.* at D-29, D-30 and D-31.

In its initial decision reversing the District Court, the Ninth Circuit panel majority ignored the trial court and reinstated summary judgment in favor of Parkowner. In so doing, the panel majority presumed the Ordinance unconstitutional based solely on an unproven economic theory published in a law review by UCLA economics professor Dr. Hirsch. This is the same Dr. Hirsch who testified as an expert at trial for Parkowners, and whose testimony was found unpersuasive by the District Court (Pet. App. D-17, ¶ 14a) and afforded little weight. *Id.* at D-12, ¶ 13c.

After embracing an economic theory that was factually disproven at trial, the Ninth Circuit invalidated the Ordinance for not advancing an unstated purpose of preserving affordable housing, while ignoring the fact that the mythical premium would not vitiate the Ordinance's seven stated purposes.

In short, with the application of heightened scrutiny, a Ninth Circuit panel majority effectively repealed City's Ordinance simply because it did not think it would work. This arrogation of legislative power highlights the evil that would be created by extending *Nollan's* heightened scrutiny to settings beyond the limited cases involving exactions or unconstitutional conditions.

CONCLUSION

Parkowners neither cite Supreme Court Rule 10, nor offer any of the reasons listed in it that would justify the grant of certiorari. In dissenting from the panel majority's original decision, Judge Fletcher noted that the Ninth Circuit using *dicta* in *Yee v. City of Escondido*, 503 U.S. 519 (1992), had crafted a takings theory that was unique to the

Ninth Circuit (Pet. App. F-35 and F-36), and which returned the Circuit to the *Lochner* [*v. People of State of New York*, 198 U.S. 45 (1905)] era when courts would second-guess legislative wisdom in enacting economic regulations. The Ninth Circuit's Order granting rehearing merely puts the Circuit back in step with this Court's decisions and the rest of the country. This Court should not grant certiorari.

DATED: January, 2006.

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In the

Supreme Court of the United States

GENE CASHMAN and EUGENIA GUINN,

Petitioners,

v.

CITY OF COTATI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005), held that a "substantially advances a legitimate state interest" test requiring courts to decide whether an ordinance furthers its objectives is not a stand alone takings test. This sort of means-ends analysis is limited to a due process claim.

Petitioners brought a takings claim under another form of the substantially advances test—one that requires a close connection between the effect of an ordinance and the objective sought to be achieved by a regulatory constraint. This is the cause-effect test applied in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

1. Does this Court's decision in *Lingle v. Chevron* preclude an independent substantially advances takings claim that requires courts to decide whether there is a close connection between the effect of a regulation and the objective sought to be achieved by a regulatory constraint?

2. Should Petitioners' pre-*Lingle* substantially advances takings claim be decided under a due process analysis post-*Lingle*, where Circuit Court precedent prohibited Petitioners from bringing a due process claim?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Gene Cashman and Eugenia Guinn respectfully file this reply to the opposition to Petition for Writ of Certiorari (Opp.).

I

THIS COURT'S DECISION IN *LINGLE v. CHEVRON U.S.A. INC.* CREATED IMPORTANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT

Respondent City of Cotati argues that Petitioners do not raise an issue appropriate for resolution by this Court. Opp. at 13-14. That argument ignores the important questions of federal regulatory takings law that arose in Petitioners' case after this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005). In *Lingle*, this Court repudiated a means-ends substantial advancement analysis as a Takings test. *Id.* at 2083-84. This Court did not address the viability of, or even mention, the cause-effect substantial advancement analysis presented in Petitioners' case. Yet, the Ninth Circuit Court of Appeals relied on the *Lingle* decision to withdraw its judgment for Petitioners. Appendix B-1.

Only this Court can clarify whether a cause-effect test—unrelated to the *Lingle* ends-means test—is properly an independent Takings test. The cause-effect test advanced by Petitioners requires a close connection between the effect of an ordinance—here, the transfer of an interest in property—and the objectives sought to be achieved by the rent control ordinance. *See* Petition for Writ of Certiorari (Petition) at 9-11. This test, whether or not properly characterized as a substantially advances test, is not the test analyzed in *Lingle*. Cotati agrees, complaining in several spots that Petitioners did

not seek to prove, or in fact prove, a *Lingle*-type means-ends substantial advancement test. *See, e.g.*, Opp. at 7.[1] The fact is that evidence regarding the effectiveness or ineffectiveness of Cotati's rent control ordinance in "protect[ing] mobilehome park residents from excessive space rents, while guaranteeing parkowners a fair, just and reasonable return" (Opp. at 4) is irrelevant to the Takings claim advanced by Petitioners.

Cotati is wrong when it says that Petitioners' case is indistinguishable from the challenge to Hawaii's ordinance in *Lingle*. Opp. at 15-16. In their facial challenge to Cotati's rent control ordinance, Petitioners successfully argued that the ordinance creates a situation where universal economic principles establish that property will be transferred from the park owners to their tenants. *See Cashman v. City of Cotati*, 374 F.3d 887, 899 (9th Cir. 2004). Unlike the property owner in *Lingle*, Petitioners did not present experts to offer opinions on whether the ordinance would fulfill its purposes. In this case, expert testimony was utilized by Petitioners for the limited purpose of establishing the economic principle that provides for the likelihood of a wealth transfer. *See Cashman v. Cotati*, 374 F.3d at 899. In fact, the economic principle upon which Petitioners relied is so widely recognized and well-established, that the Ninth Circuit Court would not even require expert testimony on this point. *Id.*

Once the economic principle was established, the court only needed to look to the ordinance's general scope and dominant features, and not to the effect of the application of the ordinance in specific circumstances. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) (A court must determine the true nature and effect of a regulation

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[1] Throughout the long course of this litigation, Cotati has used the words "substantially advances a legitimate state interest" to describe an ends-means analysis. Cotati continues to do so in its opposition brief.

by "examin[ing] the operative provisions of a statute, not just its stated purpose."). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922). And if the true nature or effect of an ordinance is to facilitate the transfer of private property without compensation, the essential nexus or cause-and-effect relationship required by takings law is absent—regardless of whether the measure will or will not achieve any of its stated objectives (such as controlling rents). In this case, the ordinance created a wealth transfer, and that wealth transfer does not advance any legitimate government interest.

The cause-effect test argued by Petitioners, like the Takings tests endorsed in *Lingle*, focuses on the "*magnitude or character of the burden* a particular regulation imposes upon private property rights." *Lingle*, 125 S. Ct. at 2084. Cotati argues otherwise. Opp. at 16. But the cause-effect test, like the Takings Clause, "does not concern itself with the underlying legitimacy of the governmental action—which is presupposed in a takings challenge—but rather, examines whether fairness requires compensating a property owner because the nature of the regulatory taking is 'functionally comparable to government appropriation or invasion of private property.'" *The Supreme Court, 2004 Term; Regulatory Takings–"Substantially Advances" Test*, 119 Harv. L. Rev. 297, 301 (2005) (footnote omitted).

The substantially advances test, formulated as a means-ends test, conflated due process and takings and allowed the courts to second-guess legislative action. Steven J. Eagle, Professor of Law at George Mason University in Virginia, wrote that "[t]he problem highlighted by *Lingle*, then, is not that the 'substantially advances' test is a bad one, but that clarity in takings jurisprudence would be greatly enhanced by one more attuned to traditional property law concepts." Steven J. Eagle, Lingle v. Chevron *and Its Effect on Regulatory Takings*, SL012 ALI-ABA 167, 170 (2005).

The test advanced by Petitioners creates none of the problems inherent in an ends-means analysis, and fits clearly within the Takings theory endorsed in *Lingle*. *Lingle* is but one step in the process of developing a coherent body of takings jurisprudence; this case provides an opportunity for the Court to come one step closer to that goal. Review is necessary to provide a clear statement that *Lingle* did not affect the validity of the cause-effect Takings test argued by Petitioners.

II

IF THE NINTH CIRCUIT COURT'S PRE-*LINGLE* JUDGMENT FOR PETITIONERS IS NOT REINSTATED, PETITIONERS SHOULD BE ALLOWED TO PROVE THEIR CASE UNDER A DUE PROCESS THEORY

Cotati claims that Ninth Circuit precedent did not prevent the park owners from alleging a due process violation but, rather, park owners could not allege such a violation because rent control is rationally related to a legitimate government purpose. Opp. at 12. Cotati's statement emphasizes the need for this Court to resolve (or remand the case so that a lower court can resolve) questions raised by the circumstances of this case. These are questions not addressed in *Lingle*.[2]

More than six years ago, Petitioners filed the lawsuit in this case. They plead a takings claim, but were precluded from bringing a substantive due process claim instead of, or in addition to, the takings claim. In *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996), the Ninth Circuit Court

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[2] Cotati misrepresents the due process claim presented by the facts of this case. Property owners do not claim that rent control, in and of itself, violates due process. This case raises the question whether due process is violated by the effect of Cotati's rent control ordinance—to compel the transfer of a valuable property interest from the park owners to their tenants.

held that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *See Weinberg v. Whatcom County*, 241 F.3d 746, 749 n.1 (9th Cir. 2001); *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999). The Takings Clause provides an explicit textual provision that subsumes any due process claims in land use cases. *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997).

The *Armendariz* line of cases cannot control in cases where a substantial advancement Takings claim is no longer recognized. Petitioners should be allowed to prove a due process claim, if *Lingle* precludes their cause-effect takings claim.

Cotati's predictions of Petitioners' chances of success on a substantive due process claim are without merit (Opp. at 14), because the standard of review applied to a substantive due process claim involving the deprivation of a property interest after *Lingle* is uncertain. Cotati cites *Lingle* for application of a standard that decides whether government action is "so arbitrary as to violate due process." Opp. at 12. Although the Ninth Circuit Court applied an arbitrary and capricious standard ten years ago when it still entertained substantive due process claims, it is not possible to know what standard that court would apply today under the new, post-*Lingle* formulation of property rights issues as due process claims. As Professor Eagle correctly notes, "[t]he adoption of some form of heightened scrutiny in property deprivation cases would go a long way towards placing property rights on a par with other individual rights." Eagle, *supra*, at 184.

These are all issues that raise important federal questions that can be examined if Petitioners are given the chance to litigate a due process claim.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, the Petition for Writ of Certiorari should be granted.

DATED: February, 2006.

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CITY OF COTATI,

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QUESTIONS PRESENTED

1. Does this Court's decision in *Lingle v. Chevron* preclude an independent substantially advances test that requires a close connection between the effect of an ordinance and the objective sought to be achieved by a regulatory constraint?

2. Should Petitioners' pre-*Lingle* substantially advances takings claim be decided under a due process analysis post-*Lingle*, where Circuit Court precedent prohibited Petitioners from bringing a due process claim?

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BRIEF *AMICUS CURIAE* OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

Amicus Western Manufactured Housing Communities Association is an association of 1,800 mobilehome park communities. It is the largest mobilehome park association in the United States. The Association has a vital interest in the issues raised by Petitioners because its members routinely experience similar property deprivations.[1]

Amicus and Petitioners jointly briefed the Court last term in *Lingle v. Chevron USA, Inc.*,[2] where we argued that the *Agins v. City of Tiburon*[3] takings theory was necessary to prevent arbitrary government infringement of our property rights.[4] *Lingle* overturned *Agins*, finding it "prescribes an inquiry in the nature of a due process, not a takings test," but affirmed *Amicus* and Petitioners' Fourteenth Amendment substantive due process protection from irrational property regulation, citing *Village of Euclid*

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[1] The parties have consented to *Amicus*' filing of this brief and their consent letters are filed with the Court. Neither party nor their counsel authored this brief in whole or in part, and no one other than *Amicus* financed its preparation or submission.

[2] 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (hereafter *Lingle*).

[3] 447 U.S. 225, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980) (hereafter *Agins*).

[4] *Brief Amicus Curiae of Pacific Legal Foundation; Gene Cashman; Athena Sutsos; Western Manufactured Housing Communities Association; and Defenders of Property Rights in Support of Respondent Chevron USA, Inc. Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 2004 U.S. Briefs 163, U.S. S.Ct. Briefs 2005.

v. Ambler Realty, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) (hereafter *Euclid*).[5]

The Ninth Circuit has a bar to *Euclid* claims under *Armendariz v. Penman*, 75 F 3d 1311, 1319 (9th Cir. 1996) (*en banc*), and refuses to overrule it. After *Lingle* it dismisses with prejudice all allegations of irrational property regulation.[6] *Amicus* respectfully requests that the Court grant certiorari and consider restoring Ninth Circuit property owners' Fourteenth Amendment protection from arbitrary government regulation.

INTRODUCTION

The Ninth Circuit does not recognize Fourteenth Amendment substantive due process violations of property rights on the grounds that these violations are subsumed and precluded by the Fifth Amendment's Takings Clause. This blanket prohibition of substantive due process property claims is extreme because it contradicts the Fourteenth Amendment's text and history and because takings and due process violations are doctrinally distinct. The majority of circuit courts decline to follow it.[7] Last term in *Lingle* the Court agreed with the majority's reasoning and held that property infringements sounding in due process are only actionable under the Fourteenth Amendment.

After *Lingle* the Ninth Circuit's blanket prohibition of substantive due process property claims is untenable, yet the Circuit refuses to overrule it. As a result, in the Ninth

[5] *Lingle*, 125 S. Ct. at 2083-2085.

[6] *Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir. 2005).

[7] *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000).

Circuit irrational and arbitrary land use regulation no longer violates the Constitution.

Petitioners are victims of this policy. In *Cashman v. City of Cotati* a Ninth Circuit court of appeals withdrew a takings judgment in Petitioners' favor under *Lingle* and summarily entered judgment against them,[8] denying their request to review Cotati's irrational deprivation of their property under the Fourteenth Amendment. The Court should grant certiorari to correct this injustice, restore harmony among the circuits, clarify that the Ninth Circuit has misinterpreted *Lingle* and affirm that municipalities can not infringe upon property owners without providing them Fourteenth Amendment due process of law.

STATEMENT OF FACTS

Petitioners Gene Cashman and Athena Sutsos (collectively Cashman) each own a mobilehome park in Cotati, California and rent spaces in their parks to mobilehome owners. In California the mobilehome park owner/tenant relationship is highly regulated. The Mobilehome Residency Law, Cal. Civ. Code § 798, severely restricts the grounds upon which a park may terminate a tenancy. In addition, a park owner may not require the removal of a home when it is sold, charge a transfer fee, nor unreasonably withhold approval of a tenant's transfer of their space lease to a new owner. (Cal. Civ. Code §§ 798.56, 798.74).

"The Mobilehome Residency Law is not and was not intended to be a rent control measure" and does not

[8] *Cashman v. City of Cotati*, 415 F.3d 1027, 1028 (9th Cir. 2005).

preempt local regulation of mobilehome park rents.[9] Accordingly, in 1998 Cotati enacted the Mobile Home Park Rent Stabilization Program, City of Cotati, Cal., Mun. Code, Ordinance No. 680, ch. 19.14, limiting the amount park owners can increase rents and providing for administrative review of the park owner/tenant relationship.[10]

Amicus' major complaint with this regulatory scheme is with the "Vacancy Control and Decontrol" section of Cotati's rent control ordinance. This section prevents mobilehome park owners from charging a fair-market rent or increasing the existing rent when ownership of a mobilehome is transferred and the home remains in place.[11]

Cotati's vacancy control is commonly known as a premium capture provision. It creates a premium in the value of Cotati's mobilehomes, and a corresponding diminution in the value of its mobilehome parks, by granting homeowners a transferable right to indefinitely occupy Petitioners' property at below-market rents. Premium capture's windfall to homeowners – and losses to park owners – can be dramatic. *Adamson Cos. v. City of Malibu* reviewed Malibu's mobilehome premium capture provision and found that "it is difficult to conceive of any reason for the enactment of such an onerous ordinance other than a desire to please the current tenants of the parks, a large and very vocal voting constituency." (854 F. Supp. 1476, 1494-1495 (D. Cal. 1994)). Nonetheless, the district court ruled that the provision was

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[9] *Gregory v. City of San Juan Capistrano*, 142 Cal.App.3d 72, 82 (1983) (disapproved on another point by *Fisher v. City of Berkeley*, 37 Cal.3d 644, 686 note 43 (1984)).

[10] *Cashman v. City of Cotati*, 374 F.3d 887, 890 (9th Cir. 2004).

[11] *Cashman v. City of Cotati*, 374 F.3d 887, 890 (9th Cir. 2004).

entitled to judicial deference. (*Id.*) As a result, after *Adamson* Malibu mobilehome prices increased many times over, reflecting the value of the perpetual, freely alienable, below-market rents the ordinance granted homeowners. In Malibu this property right is worth ten to twenty times the mobile-home's intrinsic value, and can exceed $1 million.[12]

Other federal courts have struck down premium capture as irrational because it "vitiates" rent control's ability to create affordable housing.[13] Premium capture provisions force future tenants to pay incumbent tenants for the right to below-market rents, so future tenants obtain no benefit from rent control while their up-front housing costs and mortgage payments explode.[14] Future tenants also become dependant on local government officials to sustain the premium prices they pay for their homes. This captive constituency, and the chance to manage the "large and unwieldy bureaucracies" needed to oversee rent control's administrative apparatus have proved irresistible to many politicians, despite premium capture's lack of a relation to a legitimate government interest.[15] Since voters are unlikely to refuse large-scale majoritarian rent seeking from their landlords premium

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[12] *Mobile Home Madness: Prices top $1 million*, USA Today, July 7, 2005, viewable at (http://www.usatoday.com/money/perfi/housing/2005-07-05-million-dollar-trailers_x.htm).

[13] *Richardson v. Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997), cert. denied, *Honolulu v. Small Landowners*, 525 U.S. 871, 119 S. Ct. 168, 142 L. Ed. 2d 137 (1998).

[14] *Adamson Cos. v. City of Malibu*, 854 F. Supp. at 1495, note 15 (D. Cal. 1994) (finding premium capture is "a one-time bonus to the tenants living in the park at the time it takes effect" that increases housing costs and excludes the poor from housing).

[15] *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1048 (9th Cir. 2000) (J. Fletcher, concurring).

capture provisions are frequently enacted and end up before federal courts.

In *Yee v. City of Escondido*, the Court resolved a circuit split by finding premium capture does not effect a physical taking because the mobilehome park owner invites the initial occupation.[16] In *Lingle*, the Court concluded premium capture does not effect a regulatory taking because irrational regulation is properly evaluated as violation of due process.[17] In the proceedings below the Ninth Circuit ruled, incorrectly, that following these decisions an allegation that a premium capture provision or other land use regulation is irrational no longer states any constitutional claim whatsoever.

SUMMARY OF ARGUMENT

The Court's *Considerations Governing Review on Certiorari* includes, *inter alia*, these examples of compelling reasons for granting certiorari: (1) where a United States court of appeals has decided an important federal question in a manner that conflicts with a state high court, (2) decided an important federal question in conflict with a decision of this Court, or (3) entered a decision in conflict with another United States court of appeals. (Sup. Ct. R 10 a, c).

All these considerations are present in *Cashman v. Cotati*. The Ninth Circuit's *Armendariz v. Penman* line of authority and its rule that substantive property infringements are only actionable under the Fifth Amendment has

[16] *Yee v. City of Escondido*, 503 U.S. 519, 527, 532-533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (declining to decide whether mobilehome park premium capture violates substantive due process).

[17] *Lingle*, 125 S. Ct. at 2087 (J. Kennedy, concurring).

been rejected, distinguished or ignored by nine other circuit courts and numerous state high courts. Last term in *Lingle* the Court attempted to resolve this important federal question when it clarified that claims of irrational property regulation can only be brought as violations of the Fourteenth Amendment. Since irrational property regulation no longer effects a Fifth Amendment taking, the Ninth Circuit's rule that the Takings Clause subsumes all property claims is no longer tenable.

Lingle's clarification has been lost on the Ninth Circuit. It construes *Lingle*'s reversal of a successful takings claim predicated on irrational property regulation as support for its precedents baring due process claims on this theory. Rather than adjusting its precedents to conform with *Lingle*, the Ninth Circuit misinterprets *Lingle* so as to conform to its precedents.

Since the Ninth Circuit refuses to overrule its line of authority barring substantive due process property claims *Amicus* respectfully requests the Court grant certiorari and consider overruling it for them.

REASONS FOR GRANTING CERTIORARI

1. *Cashman v. Cotati* misconstrues *Lingle* as invalidating all constitutional claims predicated on irrational property regulation.

A. The Ninth Circuit ignores *Lingle's* instructions to evaluate allegations of irrational land use regulation under the Due Process Clause.

Lingle overruled the *Agins v. Tiburon* theory that a land use regulation which fails to advance a legitimate government interest effects a Fifth Amendment taking of

property. The *Agins* theory "prescribes an inquiry in the nature of a due process, not a takings test." (*Lingle*, 125 S. Ct. at 2083).

Citing *Lingle*, the Ninth Circuit withdrew a decision it had entered granting Cashman summary judgment on an *Agins* claim and summarily entered judgment for Cotati. (*Cashman v. City of Cotati*, 415 F.3d 1027, 1028 (9th Cir. 2005)). It denied Cashman's request to evaluate their successful *Agins* claim under the Fourteenth Amendment. (*Cert. Pet.* pp. 7-8).

Cashman received what Ninth Circuit *Agins* plaintiffs typically receive after *Lingle*: Dismissal with prejudice. In *Cohn v. Contra Costa Health Servs. Dep't.*, the Cohns alleged that Contra Costa County's refusal to allow them a septic tank was capricious and unrelated to a legitimate state interest, in violation of the Takings Clause and their Fourteenth Amendment substantive due process rights. The court dismissed both claims: The takings claim under *Lingle*, and the due process claim under Ninth Circuit law that deprivations of substantive property rights can only be addressed by a Fifth Amendment takings claim. (2005 U.S. Dist. LEXIS 33827, 6-7 (D. Cal. 2005)).[18]

Since the Fifth Amendment's Takings Clause is the exclusive source of substantive property rights for Ninth Circuit property owners, and since *Lingle* held that irrational property regulation no longer effects a taking, in the Ninth Circuit irrational or arbitrary land use

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[18] *See also Vista De Santa Barbara Assocs. v. City of Carpinteria*, 143 Fed. Appx. 33, 34 (9th Cir. 2005) (*Agins* claim dismissed with prejudice); *Stardust Mobile Estates LLC v. City of San Buenaventura*, 142 Fed. Appx. 300, 301 (9th Cir. 2005) (same); *Los Altos El Granada Investors v. City of Capitola*, 2005 U.S. Dist. LEXIS 36804, 14-15 (D. Cal. 2005) (*Agins* claim dismissed, leave to amend denied).

regulation no longer violates the Constitution. According to the Ninth Circuit, "*Lingle* requires that [a claim that a land use regulation is unrelated to a legitimate interest] be dismissed with prejudice."[19] Under this rule Cashman had no substantive due process claim despite proving that Cotati's ordinance failed to advance legitimate interests, and their other constitutional claims[20] were forfeit due to summary dismissal.

B. The Ninth Circuit's refusal to hear Cashman's Fourteenth Amendment substantive due process claim misapplies *Albright v. Oliver* and *Graham v. Conner* and misreads the Constitution.

The Ninth Circuit's bar on substantive due process property rights began with *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*) (hereafter *Armendariz*). *Armendariz* held that Fourteenth Amendment substantive due process property claims were subsumed by the Takings Clause, the "more explicit" and so preclusive protection of property. (75 F.3d 1311, 1324 at note 8). *Armendariz* is a "blanket prohibition" of substantive due process claims against property deprivations.[21] In the Ninth Circuit all "claims alleging government interference with property fall under the Fifth Amendment's Takings Clause."[22]

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[19] *Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir. 2005).

[20] *Cert. Pet.* pp. 8-13 (citing *Nollan v. California Coastal Com.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).

[21] *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004).

[22] *Madison v. Graham*, 316 F.3d 867, 870 (9th Cir. 2002).

The Ninth Circuit's conclusion that the Fifth Amendment's Takings Clause is the more explicit source of property rights ignores the Constitution's text and the logic of preclusion. In *Graham v. Conner*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 112 L. Ed. 2d 114 (1994), the Court expressed concern that constitutional protections provided criminal suspects by the Bill of Rights could be expanded by arguments that procedural irregularities or undue force "deprives a suspect of liberty without due process of law." (*Graham v. Connor*, 490 U.S. at 392-393). Since liberty is an imprecise and open-ended concept, it could be "used to impose additional requirements upon such of the States' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights."[23] Therefore the Court concluded that constitutional criminal procedure and undue force protections precluded Fourteenth Amendment substantive due process claims based on the same conduct.

Armendariz's application of *Graham* to property deprivations was controversial even prior to *Lingle* because substantive due process protection of property owners is based on property, not liberty rights. ("No State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amdt. XIV, § 1). Arguably, the Fourteenth Amendment is the more explicit source of property rights since it applies to the states directly, whereas the Takings Clause ("[N]or shall private property be taken for

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[23] *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (J. Scalia, concurring).

public use, without just compensation," U.S. Const. amdt. V) applies indirectly, via incorporation.[24]

One commentator describes the circuits' sketchy logic and its policies' harsh consequences as follows: "Thus, by starting with *Graham* (Fourth Amendment seizures), applying its doctrine more generally through *Albright* (criminal protections in the Bill of Rights), the Ninth Circuit has prohibited all substantive due process claims in land development cases in federal courts west of the Rockies."[25]

C. *Armendariz's* blanket prohibition of due process is untenable after *Lingle*

Whatever the past merits of a blanket prohibition of substantive due process property claims after *Lingle* such a bar is clearly untenable. A Fourteenth Amendment substantive due process claim is precluded under *Graham* only if "its subject is necessarily governed by a more definite provision of the Constitution." (*County of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). "Substantive due process analysis is therefore inappropriate [only if plaintiffs'] claim is covered by" another constitutional provision. (*Id.* at 843) (finding no preclusion).

Lingle held that irrational land use regulation is not covered by the Fifth Amendment's Takings Clause, so claims against irrational regulation can not be precluded by the Clause. *Armendariz*'s rule that property deprivations either

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[24] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 240, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

[25] Robert Ashbrook, *Comment: Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. Pa. L. Rev. 1255, 1269-1270 (2002).

violate the Fifth Amendment or they violate nothing is untenable after *Lingle*.

D. *Lingle* anticipated and explicitly rejected the Ninth Circuit's foreclosure of substantive due process property rights.

Lingle examined a Hawaiian rent control ordinance limiting the rent gas station owners can charge station operators. The ordinance was intended to lower high retail gasoline prices and reduce market concentration, but its premium capture provision worsened both problems.[26] Chevron attacked the law as a violation of Fourteenth Amendment substantive due process and a Fifth Amendment takings. After winning summary judgment on its takings claim Chevron voluntarily dismissed its due process cause of action.[27]

Lingle reversed the judgment for Chevron on the grounds that premium capture provisions should be evaluated as a denial of due process, "an inquiry logically prior to and distinct from the question whether a regulation effects a taking." (*Lingle*, 125 S. Ct. at 2084). *Lingle* repeatedly endorses due process review of property deprivations. (*Id.*) Justice O'Connor describes her *Lingle* opinion as affirming the Due Process Clause's prohibition against irrational land use regulation.[28]

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[26] *Chevron USA, Inc. v. Cayetano*, 198 F. Supp. 2d 1182, 1183 (D. Haw. 2002).

[27] *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1035 (9th Cir. 2000).

[28] *Kelo v. City of New London*, 125 S. Ct. 2655, 2676, 162 L. Ed. 2d 439 (2005) (J. O'Connor, dissenting).

Justice Kennedy wrote separately in *Lingle* to emphasize this point:

> "This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. Chevron voluntarily dismissed its due process claim without prejudice, however, and we have no occasion to consider whether [the challenged law] represents one of the rare instances in which even such a permissive standard has been violated. (*Lingle*, 125 S. Ct. at 2087 (J. Kennedy, concurring) (citations and quotations omitted)).

The Ninth Circuit blithely treats Cashman as the Court treated Chevron, ignoring *Lingle*'s instructions not to interpret the judgment against Chevron as foreclosing Fourteenth Amendment scrutiny for ineffective legislation.

2. A majority of circuit courts and many state high courts implicitly or explicitly reject the Ninth Circuit's blanket prohibition of due process property rights.

Deciding whether the Fourteenth Amendment provides property rights has fractured the circuits. The Sixth Circuit noted the "remarkable" difference in property rights between federal jurisdictions and sought the Court's intervention:

> "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable . . . We wish it were within our power to harmonize these decisions, but the conflicts

> among circuits are too great. Harmony will have to await action by the Supreme Court."[29]

A majority of circuit courts do not follow *Armendariz*,[30] and nine circuits entertain at least some substantive due process property violations on their merits.

The Fifth, Sixth and First Circuits have considered *Armendariz* and decline to follow it. In *John Corp. v. City of Houston* the Fifth Circuit evaluated the conflicting authority and decided not to follow *Armendariz*. (214 F.3d 573, 583 (5th Cir. 2000)).

In *Pearson v. Grand Blanc*, the Sixth Circuit overturned a district court ruling that "all arbitrary and capricious substantive due process claims are merged" into taking claims. (961 F.2d 1211, 1216, 1223 (6th Cir. 1992)). Recently, the Sixth Circuit has continued to follow *Pearson* (*e.g. Tri-Corp. Mgmt. Co. v. Praznik*, 33 Fed. Appx. 742, 747 (6th Cir. 2002)) but will dismiss a substantive due process property claim under *Armendariz* where the plaintiff "merely re-states" their takings claims. (*Buckles v. Columbus Mun. Airport Auth.*, 90 Fed. Appx. 927, 931 (6th Cir. 2004)).

In *South County Sand & Gravel Co. v. Town of S. Kingstown*, the First Circuit allowed that *Armendariz* may properly bar "garden-variety" takings claims brought as due process violations, but declined to overrule circuit authority recognizing traditional substantive due process property rights. (160 F.3d 834, 835-836 (1st Cir. 1998)).

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[29] *Pearson v. Grand Blanc*, 961 F.2d 1211, 1217-1220, note 45 (6th Cir. 1992).

[30] *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000) (finding *Armendariz*'s "blanket rule" eliminating substantive due process property rights "inconsistent with our precedents and with the approach taken by a majority of other circuit courts.").

The D.C. Circuit has not considered *Armendariz* but rejects its reasoning. *Tri County Indus. v. District of Columbia* ruled that *Graham* and *Albright* do not support preclusion of substantive due process property claims. (105 F.3d 455, 459 (D.C. Cir. 1997)).

The Second, Third, Fourth, Eighth and Eleventh Circuits allow substantive due process property claims without discussing *Graham* or preclusion. (*UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 401 (3d Cir. 2003); *Villas of Lake Jackson v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995); *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999); *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997)).

Only the Seventh, Ninth and Tenth Circuits bar all substantive due process property claims, and only the Tenth follows *Armendariz* and does so on the basis of *Graham*. (*Bateman v. City of W. Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996); *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995)).

A. State courts uniformly reject the Ninth Circuit's interpretation of *Lingle*.

Many state high courts entertained federal substantive due process property claims even prior to *Lingle*. In *Mission Springs, Inc. v. City of Spokane*, Spokane approved Mission Springs' thirty-three building apartment project subject to several conditions, which Mission Springs fulfilled. Due to political pressure Spokane withheld Mission Springs' construction permit, despite the City Attorney's advice that it lacked any legal basis to do so. (134 Wn.2d 947, 952-954 (Wash. 1998)).

Distinguishing *Armendariz*, the Washington Supreme Court found Spokane's actions violated the Fourteenth Amendment, not the Takings Clause. "Thus, we follow that overwhelming body of authority which applies Due Process principles to similar factual situations." (*Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 964).[31]

As of this writing every published state court decision that has considered the matter disagrees with the Ninth Circuit's interpretation of *Lingle*. In *Gove v. Zoning Bd. of Appeals*, the Supreme Judicial Court of Massachusetts examined a property owner's federal takings and substantive due process claims against a zoning board. In light of *Lingle*'s discussion of due process review the court concluded "*Lingle* renders a zoning ordinance valid under the United States Constitution unless its application bears no reasonable relation to the State's legitimate purpose." (*Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 760 (Mass. 2005) (quotations omitted)). Not in the Ninth Circuit; here *Lingle* renders a zoning ordinance valid no matter how unreasonable and requires that a claim otherwise "be dismissed with prejudice."[32]

The Supreme Judicial Court of Massachusetts dismissed Gove's *Agins* claim but addressed her substantive due process claim on its merits. In contrast, Cashman, and other Ninth Circuit property owners, lost both claims after

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[31] *See also Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 263 (Iowa 2001) (distinguishing substantive due process property violations from takings); *Brunelle v. Town of S. Kingstown*, 700 A.2d 1075, 1083-1084, note 5 (R.I. 1997) (same); *Carpenter v. City of Petal*, 699 So.2d 928, 932-934 (Miss. 1997) (finding anti-mobilehome zoning ordinance violated substantive due process); *Red Maple Properties v. Zoning Com. of Brookfield*, 222 Conn. 730, 739 (Conn. 1992); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998).

[32] *Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir. 2005).

Lingle. (*Cohn v. Contra Costa Heal & Servs. Dep't*, 2005 U.S. Dist. LEXIS 33827, 6-7 (D. Cal. 2005) (dismissing *Agins* and due process claim under *Armendariz* and *Lingle*) (discussed *ante* p.8)).

In *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, plaintiff prevailed on a federal substantive due process claim against a county that had repeatedly changed its zoning to prevent plaintiff from building a landfill, despite pleas that a landfill was needed and plaintiff's was the only suitable site. (2005 Tenn. App. LEXIS 382, 5-8 (Tenn. Ct. App. 2005)). The county appealed on the grounds that plaintiff's substantive due process property rights were subsumed by the Takings Clause – the *Armendariz* rule. (*Id.* at 12).

The court declined to follow *Armendariz*, finding that after *Lingle Armendariz* was no longer tenable:

> "The consequence of the *Lingle* holdings to the issue before us is clear. The Due Process Clause and the Takings Clause provide different protections from governmental action . . . Consequently, just because a zoning ordinance affects real property, a landowner is not precluded from bringing a claim challenging the validity of that ordinance on the basis it is not rationally related to a legitimate governmental purpose. The Takings Clause does not pre-empt a challenge to a zoning ordinance based on substantive due process. To the contrary, as the Court stated in *Lingle*, the due process challenge precedes any takings claim."[33]

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[33] *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, 2005 Tenn. App. LEXIS 382, 80 (Tenn. Ct. App. 2005).

3. *Armendariz*'s bar to *Euclid* allows Ninth Circuit municipalities to enact legislative schemes the Court has previously struck down and should be overruled.

Substantive due process has had a continuous role in federal oversight of land use regulation since the Fourteenth Amendment's enactment. In 1887, *Mugler v. Kansas* found that Kansas's prohibition of alcohol did not deprive brewers of property without due process, articulating the substantial relation to public health, safety or morals test still applied today.[34] In 1926, the Court handed down *Village of Euclid v. Ambler Realty Co.*, confirming that the due process standard applied to zoning.[35] *Lingle* called *Euclid* "historic,"[36] and the case lent its name to the "Euclidian" zoning approved by the Court and enacted throughout the country.[37]

While the *Euclid* standard is highly deferential municipalities habitually test its limits. Just two years after *Euclid*, *Nectow v. Cambridge* found that Cambridge, Massachusetts' zoning of a parcel of land bordering a glue factory, a Ford Motor plant and railroad tracks for residential use was arbitrary and irrational and failed *Euclid* due process scrutiny.[38]

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[34] *Mugler v. Kansas*, 123 U.S. 623, 66, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

[35] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

[36] *Lingle*, 125 S. Ct. at 2083.

[37] *Goodwin v. Kansas City*, 244 Kan. 28, 32 (Kan. 1988).

[38] *Nectow v. Cambridge*, 277 U.S. 183, 187-88, 72 L. Ed. 842, 48 S. Ct. 447 (1928); *see also Moore v. East Cleveland*, 431 U.S. 494, 520-521, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (J. Stevens, concurring) (zoning ordinance allowing grandchildren to live with their grandmother if they are siblings, but not if they are cousins, "must fall" under *Euclid* and *Nectow*).

The Court has applied, cited or analyzed *Euclid* and *Nectow* in many of the land use cases before it, including *Lingle*, and many state high courts have adopted their holdings as the state's zoning standard of review.[20]

Euclid establishes the minimum due process municipalities must provide property owners – except in the Ninth Circuit. Here there is no constitutional bar on irrationality nor requirement for due process because *Armendariz* specifically bars all *Euclid* claims:

> "We need not and do not address whether the City's conduct was rational. Even if the City's alleged conduct was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' *Euclid v. Ambler Realty Co.*, the plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims under the rule of *Graham v. Connor*." (*Armendariz*, 75 F.3d at 1319 (9th Cir. 1996) (citations omitted)).

Ninth Circuit municipalities are free to enact any manner of unreasonable land use schemes, even those the Court has previously struck down. In *Buckles v. King County*, the Buckles' property was "singled out . . . and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land." (191 F.3d 1127, 1138 (9th Cir. 1999)). The Buckles' zoning was arbitrarily changed from limited commercial to exclusively residential – the same facts as *Nectow*. (*Id.* at 1131-1132). No matter; their substantive due process claim failed under *Armendariz*. (*Id.* at 1138).

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[20] *Lingle*, 125 S. Ct. at 2083-2085; *see* note 31, p. 16 *ante* for state cases.

Armendariz's bar on *Euclid* should be overruled and *Cashman v. Cotati* is the perfect case to do it. Cashman had a ripe, timely takings claim that precluded a ripe, timely due process claim. The Ninth Circuit construes *Lingle* to mean that Cashman has lost both. This is wrong, and the Ninth Circuit's line of cases saying otherwise needs to be overruled, starting with *Armendariz*.

CONCLUSION

The important federal question of whether the Fourteen Amendment provides property rights has divided the circuits and raised doubts as to the constitutional limitations on government regulation. The Court took a step towards settling this question last term but the Ninth Circuit has proven unable to follow *Lingle*'s instructions. The Court can complete the process it began in *Lingle* by granting certiorari and considering whether to restore Fourteenth Amendment rights to property owners west of the Rockies.[40]

Respectfully submitted,

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[40] Robert Ashbrook, *Comment: Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. Pa. L. Rev. 1255, 1269-1270 (2002).